Nov. 3rd 1869 Affirmed and Mandate to Field. } Field
For bill of exceptions.

6

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 182.

J. R. YOUNG & SONS, PLAINTIFFS IN ERROR,

vs.

WILLIAM MARTIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED DECEMBER 7, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 182.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 In the Supreme Court of the United States. In error to the Supreme Court of Utah Territory.

E. R. YOUNG & SONS, plaintiffs,
vs.
WILLIAM MARTIN, defendant.

And now come said plaintiffs and say, that in the record and proceedings herein there is manifest error in this, to wit:

1st (First.) The whole record of said case being before the Supreme Court of said territory, on said appeal it was the duty of said court, in pursuance of law and the 7th sect. of an act of the legislature of said territory providing for appeals to said Supreme Court, (see p. 66 of the revised statutes of said territory,) to examine any error appearing in the proceedings, and give judgment on the whole record, according to the merits of the whole case, and not merely on the points stated by counsel. And the right of said plaintiffs to recover the goods in the complaint described, being clearly shown and admitted by the pleadings set forth in said record, the Supreme Court of said territory erred in dismissing, on the motion of the defendant,

2 the appeal of said plaintiffs, and in not giving, in accordance with the prayer of said plaintiffs, in said appeal, judgment in their favor for said goods and costs, as on confession.

2d. (Second.) The demurrer of plaintiffs was wrongfully overruled by the District Court, and said demurrer being for matter of substance and not of form, the exceptions noted on the record to the ruling on the same were not, as alleged by the defendant's motion to dismiss the appeal, and as held by a majority of the Supreme Court of said territory, waived by the plaintiff's answering over, the subsequent pleadings not having cured the alleged defects.

3d. (Third.) The motion of plaintiffs for judgment on the pleadings was erroneously overruled by the District Court; and afterwards judgment was rendered for the defendant, for the possession of the goods in the complaint described, together with costs, when judgment should have been rendered for plaintiffs, as by confession, on the record; for said record in said case clearly shows the plaintiff's right to recover said goods, and therefore the judgment on said

3 record for the defendant has no validity; and the exceptions noted on said record, to the overruling of the plaintiff's motion for judgment on the pleadings, were not, as alleged in the defendant's motion, to dismiss the appeal, and as held by a majority of said Supreme Court of said territory, waived by the plaintiffs answering over, because no pleadings were filed after said motion for judgment was made, nor is the judgment rendered for the defendants, as held by a majority of the Supreme Court of said territory, cured by trial and verdict, because the defect in said judgment, as appears from the record is one of substance, and which cannot be amended or cured by verdict.

Wherefore, said plaintiffs pray that the judgment dismissing their appeal may be reversed, and that this court may render judgmen

on the whole record for the plaintiffs, pro confesso, for the goods described in the complaint, together with costs.

BASKINS & HEMPSTEAD,
Att'ys for Plaintiffs.

Endorsed: E. R. Young & Sons *vs.* Wm. Martin. Assignment of Errors. Filed Oct. 19th, 1867. W. J. Appleby, clerk, &c.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Supreme Court in and for the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of judgment in a plea, which is in the said Supreme Court before you, between "E. R. Young & Sons," (a firm composed of Ebenezar R. Young, sen., Ebenezar R. Young, jun., and John W. Young,) and William Martin, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be thereupon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City, D. C., on the first Monday of December next, A. D. 1867, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that
5 error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixteenth day of October, A. D. 1867, and of the independence of the United States of America the ninety-second.

[SEAL.] W. J. APPLEBY,
Clerk of the U. S. Supreme Court for Utah Territory.

Endorsed: E. R. Young & Sons, pl'ffs *vs.* Wm. Martin, def't in error. From the Supreme Court of the United States to S. Court, U. T. Filed Oct. 16th, 1867. W. J. Appleby, cl'k U. S. S. Court for Territory of Utah.

6 UNITED STATES OF AMERICA, *ss:*

To William Martin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the 1st Monday of December next, pursuant to a wrti of error filed in the clerk's office of the Supreme Court of Utah Territory, wherein E. R. Young & Sons are plaintiffs and you are defendant in error, to

show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Titus, chief justice of the Supreme Court of Utah Territory, on this the 16th day of October, 1867.

[SEAL.] JOHN TITUS,
Chief Justice of Utah.

Endorsed: E. R. Young & Sons *vs.* William Martin. Citation to the defendant. Oct. 16, 1867, service accepted, Marshall & Carter, att'ys for def't in error. Filed October 16th, 1867, W. I. Appleby, clerk U. S. S. court for U. T.

7 UNITED STATES OF AMERICA, *Territory of Utah, ss* :

At the regular October term of the U. S. Supreme Court, within and for tue Territory of Utah, began and held at the court-house in Great Salt Lake Oity, the capitol of said Territory, on Monday, October 7th, A. D. 1867, the Honorable John Titus, chief justice, presiding, and their honors Thomas I. Drake and Solomon P. McCurdy, associate justices, present.

Among other causes then and there heard and decided before said court was the following cause, to wit:

Copy of Record.

OCTO. 7*th*, 1867.

The case of Ebenezar R. Young, sr., Ebenezar R. Young, jr., and John W. Young, persons doing business under the name and firm of "E. R. Young & Sons," appellants *vs.* William Martin, appellee, on an appeal from the district court in and for the third judicial district, was called.

Appellee, by his attornies, "Marshall & Carter," filed a "motion to dismiss the appeal," the following being a true copy.

8 "In the Supreme Court of the Territory of Utah, October term, A. D. 1867.

Motion to dismiss appeal.

E. R. YOUNG & SONS, appellants,
vs.
WILLIAM MARTIN, appellee.

John Titus, chief justice.

Now comes the defendant, William Martin, by Marshall & Carter, his attornies, and move the court to dismiss the appeal herein for this:

1st. That plaintiffs in the lower courts waived their exceptions to the ruling on the demurrer, when they pleaded over, and such demurrer was thereby withdrawn.

2nd. That the verbal motion for judgment was but a repetition of the demurrer, made under a different name, and embracing the same points as those embraced in the demurrer; and this appeal, taken on an assignment of errors, is based alone on these two alleged errors, which exceptions plaintiffs waived by pleading over and going to trial on the merits in the court below, and therefore have no standing in this court."

(Signed) MARSHALL & CARTER,
Att'ys for Appellee.

9 Which said motion was endorsed as follows: In the Supreme Court, Territory of Utah, E. R. Young & Sons *vs.* William Martin. Motion to dismiss appeal. Copy served this 2nd October, A. D. 1867. Signed C. H. Hempstead, counsel for appellants. Filed Oct. 7th, 1867, W. I. Appleby, clerk U. S. Court, U. T.

Court heard the motion read and held the same under advisement, in order to examine the record filed in the cause from the court below.

OCT. 8*th*.

The motion to dismiss the appeal in the case of E. R. Young & Sons *vs.* William Martin, filed heretofore and held under advisement by the court, was allowed to be heard, Justice McCurdy dissenting; and thereupon the motion was argued by Marshall & Carter, for the appellee, and Baskin & Hempstead, esqs., for the appellants, Mr. Carter closing for the appellee, and submitted to the court.

OCT. 9*th*.

10 The motion to dismiss the appeal in the case of E. R. Young & Sons *vs.* William Martin, argued yesterday, was sustained by the court, Associate Justice Drake delivering the written opinion of the court.

Copy of the opinion.

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN.

This case is brought into this court by an appeal taken by the plaintiffs to the judgment, and ruling of the District Court for the 3d judicicial district.

The appellants have assigned the following as errors:

First. The court erred in overruling the demurrer filed by the plaintiffs to the defendant's answer.

Second. The court erred in ruling thereon that the defendant had a lien on the goods of E. R. Young & Sons now in his possession for freight, both by McWhirt and Irwin trains.

Third. The court erred in ordering the plaintiff to reply as though the demurrer had not been filed.

Fourth. The court erred in overruling the verbal motion of
11 plaintiffs for judgment, and damages on the pleadings.

The defendant has filed a motion to dismiss the appeal, and the following are assigned as reasons in support of the motion.

First. The plaintiff's in the lower court raised their exceptions to the ruling on the demurrer, when they pleaded over, and said demurrer was thereby withdrawn.

Second. That the verbal motion for judgment was but a repetition of the demurrer made under a different name, and embracing the same points as those embraced in the demurrer, and the appeal is taken, and the assignment of error is based on these two alleged errors, which exceptions the plaintiff's waived by pleadings and going to trial on the merits in the court below, and therefore have no standing in this court.

The counsel for and against the motion to dismiss the appeal having been heard, it is now for the consideration of the court.

The 2 and 3d errors assigned are incidental to the first; they arise out of it, or are involved by it, and by no fair construction can they be considered as separate and distinct, and they will be governed by the same rules, and abide the same determination which awaits
12 the first.

The fourth assignment of errors relates to a motion made by the plaintiffs for judgment on the pleadings, as they were perfected after the demurrer had been overruled. To give to this motion any proper and beneficial effect, we must consider it in the nature of a demurrer, not a repetition of the first. After the first demurrer were overruled the pleadings were perfected, and the condition thereof was changed, and the party had a right to file another demurrer and to have all the advantages, taking therewith all the hazards attending the first.

It is a rule of law not to be controverted that where a party demurs to the pleadings of his adversary, and the demurrer is overruled, he must not proceed any further by pleading or going to trial if he would avail himself of any error in the ruling of the court upon the demurrer.

The latest decision upon this point which has come under my observation is that in the case of Bele *vs.* The O. & M. Railroad, reported in the 4th Wallace, 598. The same doctrine was held in the case of Pierce *v.* Minturn, 1, California Reports, 470.

It is said that this doctrine was made at an early day in the
13 history of that State, and that subsequent decisions are otherwise. They have enacted a code of practice, and whatever may be the rule there now, it cannot be doubted but that decision reflected the law of the land and throughout the United States at the time it was made, where it was not controlled by statutory enactments.

In the case of Boyd *et al. ads.*, the U. S., (5 Howard, 30,) the doctrine is most clearly and emphatically laid down. It is useless to seek for other authorities upon this subject. I know of no case where the party seeking relief in a court of revision, either upon appeal or writ of error, where this doctrine has not been maintained if the question arose.

It is so well founded in common sense that no argument can disturb it. To doubt it, or seek to overthrow it, except by legislative enactment, would be the evidence of judicial dementation.

The proceedings in this case seem from the frequent repetition of counsel to have been—first, a declaration by the plaintiff's a plea in abatement by the defendant, then an answer, then a demurrer by the plaintiffs, then an replication to the answer, then a rejoinder by the defendant, then a sur-rejoinder by the plaintiffs, and then a motion for judgment, and then a trial by jury, in which both parties
14 participated by giving evidence and addressing the jury.

Of the exact nature of some of the pleadings we are left to conjecture, for on inspecting the record we find nothing to make conjecture a certainty. We may believe the plaintiff's filed a demurrer to the answer, but what was the form or substance of that demurrer we have no means of ascertaining; it is not to be found in the record. Should it become important for us to determine whether the demurrer was one of form or substance, by what rule should we be led?

It is claimed by the plaintiffs that the court below erred by overruling or denying the motion for judgment. What was the form of this motion, or what reason for its allowance, accompanied it, we know not. This important motion was not reduced to writing. All the interest of the parties in this important matter is left to rest upon a verbal motion; such a pernicious practice ought not to be indulged. We may believe all that is said of it, but if we look to the record, we have nothing to determine the exact nature and purpose of the motion.

It may be that the deficiency in the record and proceedings is immaterial in the solution of the question before us; but if the
15 security of the rights of parties does not require a greater degree of strictness and attention, yet the reputation and success of the practioner does.

Again, I remark, there is no bill of exceptions accompanying this record. Is it expected that these hurried and important questions arising upon exceptions to the ruling of the court below are to be heard and settled by us without a bill of exception before us? The idea is repulsive—it is preposterous; and I hope, for the honor of the profession, that hereafter no such occurrence will arise.

Giving to these omissions the very least importance; putting the most favorable construction upon the acts and proceedings of the parties, it is manifest, that should we hear the argument of counsel upon the errors assigned in this appeal, it could result in nothing more than a re-hearing of the questions arising upon the demurrer, and upon the motion for judgment. These have been heard in the court where they were made, and the party seeking redress here has by his own acts, placed them beyond the reach of review, and whatever may have been the errors of the court in its ruling upon the demurrer or motion, the party, by pleading over, and going to trial has taken it out of the power of this court to correct these errors on review.

16 Therefore, the motion to dismiss must prevail, and the order of the court should be made in conformity.

To this opinion, delivered by Justice Drake, the Chief Justice concurred, Justice McCurdy dissenting.

Endorsed: E. R. Young & Sons *vs.* William Martin. An appeal from the 3d jud. district court to Supreme Court of Utah. Opinion of the court delivered Oct. 9th, 1867, filed and recorded in Record A, of opinions and decrees, pages 33, 34 and 35, October 10th, 1867, W. J. Applebly, clerk, &c.

Mr. Baskin, one of the counsel on the part of the appellants, excepted to the opinion of the court, and gave verbal notice that he would carry up the case to the Supreme Court of the United States, in error.

It is therefore ordered, adjudged, and decreed by this court, that the appellee in this case, William Martin, have and recover of
17 and from the appellants, E. R. Young & Sons., his costs in this behalf expended in this court, taxed at thirteen dollars and ninety-four cents, and that execution issue therefor.

OCT. 16*th*.

Ebenezer R. Young, sen., of the firm of E. R. Young & Sons, now plaintiffs in error, *vs.* William Martin, defendant in error to the Supreme Court of the United States, filed an affidavit in said cause, stating that the writ of error is not intended for delay, but, as he verily believes, to subserve the ends of justice, the following being a true copy:

In the Supreme Court of the United States.

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN. } In error.

TERRITORY OF UTAH, *Great Salt Lake City and Co., ss:*

E. R. Young, sen., one of the above-named plaintiffs, being duly sworn upon his oath, says that the writ of error in the above-named case is not sued out by plaintiffs for the purposes of delay or vexation, but in good faith, and for the purposes of, as he verily
18 believes, the ends of justice; that the amount in controversy is over ten thousand dollars.

(Signed) E. R. YOUNG, *Sen.*

Sworn to and subscribed before me this the 16th day of October, 1867.

(Signed) W. J. APPLEBY,
Clerk U. S. Supreme Court for U. T'y.

And endorsed as follows: E. R. Young & Sons *v.* William Martin. Affidavit of plaintiffs filed October 16th, 1867. (Signed) W. J. Appleby, clerk U. S. Supreme Court for Utah T'y.

Same day plaintiffs in error filed their bond in the sum of three thousand dollars, ($3,000,) duly approved by the Hon. John Titus, chief justice of this court.

In the Supreme Court of the United States.

Copy of bond.

E. R. YOUNG & SONS, plaintiffs,
vs.
WILLIAM MARTIN, d'ft. } In error.

19

Know all men by these presents that we, E. R. Young & Sons and S. W. Richards and George G. Snyder, are held and firmly bound unto the above-named William Martin in the sum of three thousand dollars, to be paid to the said William Martin, his executors or administrators, to the payment of which, well and truly to be made, we bind ourselves, jointly and severally, our heirs, executors, and administrators.

Provided, always, these presents are upon the following conditions, to wit:

That whereas the above-named E. R. Young & Sons hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Supreme Court of Utah Territory. Now, therefore, if the above-named E. R. Young & Sons shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue in law.

In testimony whereof, we hereunto set our hands and seals, this the 16th day of October, A. D. 1867.

[SEAL.] (Signed) E. R. YOUNG & SONS.
[SEAL.] S. W. RICHARDS.
[SEAL.] GEO. G. SNYDER.

Signed, sealed, and delivered in the presence of—
JOS. J. TAYLOR,
W. J. APPLEBY.

20 To said bond the following affidavit was annexed:

TERRITORY OF UTAH, *Great Salt Lake County, ss:*

Samuel W. Richards and George G. Snyder, who have signed the foregoing bond, being duly sworn on their corporal oaths, each for himself, and not one for the other, deposes and says that he is worth the sum of six thousand dollars, over and above his just debts and liabilities, exclusive of property exempt from execution.

(S'd) S. W. RICHABDS.
GEO. G. SNYDER.

Subscribed and sworn to before me on this 16th day of October, A. D. 1867.

(S'd) W. J. APPLEBY,
Clerk U. S. Supreme Court for U. T'y.

And endorsed as follows: E. R. Young & Sons *vs.* William Martin. Bond of plaintiffs approved, Oct. 16th, 1867. (S'd) Marshall & Carter and John Titus, chief justice of Utah. And filed
21 Oct'r 16th, 1867. (S'd) W. J. Appleby, clerk, &c.

Same day, a writ of error in said cause was allowed, and the clerk of this court issued the same, made returnable to the Supreme Court of the United States, at Washington city, D. C., on the first Monday of December next, A. D. 1867.

Copy of the writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the U. S. Supreme Court in and for the Territory of Utah, greeting:

Because, in the record and proceedings, as also in the rendition of judgment in a plea, which is in the said Supreme Court before you, between E. R. Young & Sons (firm composed of Ebenezar R. Young, sr., Ebenezar R. Young jun., and John W. Young) and William Martin, defendant in error, a manifest error hath happened, to the great damage of the [the] said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be
22 thereupon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington city, D. C., on the first Monday of December next, A. D. 1867, in the said Supreme Court, to be then and there held. That the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness, the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixteenth day of October, A. D. 1867, and of the independence of the United States of America the ninety-second.

[SEAL.] (S'd) W. J. APPLEBY,
Clerk of the U. S. Supreme Court for Utah Territory.

Endorsed: E. R. Young & Sons, pl'ffs, *v.* William Martin,
23 defd't in error. From the Supreme Court of the United States to S. Court of U. T'y. Filed October 16th, 1867. (Signed) W. J. Appleby, clerk U. S. S. Court for T'y Utah.

Same day, (Oct. 16th,) a copy of said writ of error (duly certified,) was lodged in the clerk's office of this court, by Messrs. Baskin & Hempstead, esqrs., attornies for the plaintiffs in error.

Endorsed as follows: E. R. Young & Sons, plaintiffs in error, *vs.* Wm. Martin, defendant in error. Copy of writ of error lodged, in pursuance of the statute of the United States in such case made and provided, for the above-named William Martin, defendant in error. (Signed) Baskin & Hempstead, att'ys for plaintiffs in error.

A "citation" to said defendant in error, issued the same day, signed by the Honorable John Titus, "Chief Justice of Utah," a copy of which was served on the defendant's attornies, Marshall &
24 Carter, and left with them, and the acknowledgement of such service, endorsed on the original citation, and filed in the clerk's office of this court.

Copy of Citation.

United States of America to William Martin, greeting:

You are hereby cited and admonished to be, and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday in December next pursuant to a writ of error filed in the clerk's office of the Supreme Court of Utah Territory, wherein E. R. Young & Sons are plaintiffs, and you are defendent in error, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Titus, Chief Justice of the Supreme Court of Utah Territory, on this 16th day of October, 1867.

[SEAL.] (Signed,) JOHN TITUS,
Chief Justice of Utah.

25 Which said citation was endorsed as follows: E. R. Young & Sons *vs.* William Martin. Citation to the defendant. Oct. 16th, 1867, service accepted. (Signed) Marshall & Carter atty's for defd't in error. Filed October 16th, 1867. (Signed) W. I. Appleby, clerk U. S. S. Court for U. T'y.

TERRITORY OF UTAH, *County of Great Salt Lake, ss:*

I, William I. Appleby, clerk of the U. S. Supreme Court, in and for the Territory of Utah, do hereby certify that the within and foregoing, is a true copy of the record and proceedings as had before said Supreme Court, in the case of E. R. Young & Sons *vs.* William Martin, and also a true copy of the record and proceedings had in said cause, in the third District Court, in and for the 3d judicial district for said Territory, as remaining of record in my office, together with the original writ of error to this court, and the citation to said defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office, in G. S. L. City, U. T., October 19th, A. D. 1867.

[SEAL.] W. I. APPLEBY, *Cl'k.*

[5-cent int. rev. stamp.]

27 Dist. Court, third judicial district, in and for the Territory of Utah, March term, A. D. 1867.

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN. } In replevin.

Hon. John Titus, judge. Judgment for defendant.

Mess. MARSHALL & CARTER, att'ys for Wm. Martin:

GENTLEMEN: You will please take notice that the plaintiffs above named have taken an appeal to the Supreme Court of the said Territory from the judgment rendered in the above-entitled cause, for error appearing in the records.

A copy of assignment of errors is hereto annexed.

Respectfully.

BASKIN & HEMPSTEAD,
Att'ys for Appelants.

Great Salt Lake City, Aug. 2d, 1867.

28 In the Supreme Court of the Territory of Utah. Regular term, October, A. D. 1867.

Assignment of errors.

E. R. YOUNG & SONS
vs.
WM. MARTIN. }

Hons. John Titus, chief justice, Thos. J. Drake and Solomon P. McCurdy, associate justices.

In replevin, on appeal of error in record of District Court of third judicial district of said Territory.

The above-named plaintiffs come now and say that in the record and proceedings in the aforesaid case, a full transcript whereof is hereto attached and filed, there is manifest error in this, to wit:

First. That the court erred in overruling the demurrer filed by said plaintiffs to the said defendant's answer.

Second. That the court erred in ruling thereon that the "defendent has a lien on the goods of E. R. Young & Sons, now in possession of defendant, for freight, both by the McWhirt train and the Irwin train.

Third. That the court erred in ordering plaintiffs to reply as though demurrer had not been filed; to which several rulings
29 and order, plaintiffs, by their counsel, then and there excepted, as appears of record.

Fourth. That the court erred in overruling the verbal motion of plaintiffs for judgments and damages in the proceedings; to which ruling plaintiffs then and there excepted, as appears from the record hereto. Wherefor plaintiffs pray that the judgment rendered in said

cause may be reversed, annulled, and held for naught, and that judgment may be rendered for the said plaintiffs on the record.

E. R. YOUNG & SONS,
By BASKIN & HEMSTEAD,
Att'ys for Pl't'ffs.

Endorsed: E. R. Young & Sons, appelents, *vs.* Wm. Martin, appellee. Notice of appeal and assignment of errors. We acknowledge service this day of written notice and copy of assignments of errors. Signed by Marshall & Carter, att'ys. Great Salt Lake City, Aug. 2d, 1867.

30 In the District Court in and for the third judicial district of the Territory of Utah. Regular term, A. D. 1866–'7.

Transcript on appeal.

E. R. YOUNG, EBENEZER R. YOUNG, jr., AND John W. Young, partners, doing business under the name and style of E. R. Young & Sons, plaintiffs,
vs.
WILLIAM MARTIN, defendent.

TERRITORY OF UTAH, *Great Salt Lake County ss:*

Hon. John Titus, judge.

Said plaintiffs say that they are the owners of, and are entitled to the possession of, the following-described goods, to wit: 1 chest of tea; 7 doz. of L. H. forks; 4 boxes merchantdise; 1 sack of rice; ½ doz. shovels; 3 bundels of Russ. iron; 4 boxes of merchantdise; 3 cast cog wheels; 2 bevelled cog wheels; 1 shaft for machine; 2 boxes of castings; 1 small hopper to mill; $2,015; 7 pullies; 1 chest; 2 centers to wheels; 2 barrells of G. ware; 1 cask of merchantdise; 1 hogshead of ware; 1 hogshead of hardware; 1 box of H. ware; 1 hopper to mill; 1 box of merchantdise; 1 barrel of merchantdise; 6 pieces of S. steel; 8 bundles (4 E. A.) plow handles; 4 cook stoves; 2 pieces of mill machinery; 1 barrel of merchantdise; 1 box merchant-
31 dise; 1 box of merchantdise, (N. H. Miles;) 2 boxes of nails; 4 cook stoves and 1 parlor stove, which said goods, amount in value to the sum of eleven thousand dollars, and are now stored in Wm. H. Hooper's warehouse, in G. S. L. City, Utah Territory; that said defendent has said goods in his possession and control, and unlawfully keeps said plaintiffs out of possession of the same, although he has by them been requested to deliver said goods to the possession of said plaintiffs.

Said plaintiffs, therefore, pray that a writ of replevin may issue against the said defendent for the possesion of said goods; and upon a hearing, the same be restored to them, and that they may recover their damages sustained by reason of the premises which, they allege, amounts to the sum of five thousand dollars; also the costs in this behalf expended.

C. H. HEMPSTEAD & THURMOND & BASKIN,
Att'ys for Plaintiffs.

TERRITORY OF UTAH, *Great Salt Lake County, ss:*

E. R. Young, one of the plaintiffs in said case, being first
32 duly sworn upon oath, says that the things contained in the foregoing complaint are true, as he verily believes.

E. R. YOUNG, *Sen'r.*

Sworn to and subscribed before me this the 31st day of July, A. D. 1866.

PATRICK LYNCH, *Clerk, &c.*

Endorsed: Filed July 31st, 1866. P. Lynch, clerk, &c.

Bond.

Know all men by these presents, that we, E. R. Young, Ebenezer R. Young, John W. Young, and John Smith, Henry Riser, Joseph Home, and George Goddard, their surities, are held and firmly bound unto one William Martin in the penal sum of twenty-two thousand dollars, to the payment of which, well and truly to be made to him, the said Wm. Martin, we do hereby, jointly and severly, bind ourselves, our heirs, executors, and administrators: Provided always, and these presents are upon this condition, that whereas the said E. R. Young, Ebenezer R. Young, and John W. Young, on the 31st day of July, A. D. 1866, sued out of the third District
33 Court of the third judicial district of the Territory of Utah a writ of replevin against the said William Martin, for certain goods and chattles, in their complaint in said action described, and alleged to be of the value of eleven thousand dollars.

Now, if the said E. R. Young, Ebenezer R. Young, and John W. Young shall appear in said court and prosecute their said suit to effect and pay all cost and damages which shall be awarded against them, or for which they may in any way be rendered liable by reason of said suit, then these presents to be void; otherwise to be and remain in full force.

Given under our hands and seals this 31st day of July, A. D. 1866.

[SEAL] E. R YOUNG, Senr.,
[SEAL] HENRY RISER,
[SEAL] JOSEPH HORNE,
[SEAL] E. R. YOUNG, Jr.,
[SEAL] J. W. YOUNG,
[SEAL] JOHN SMITH,
[SEAL] GEORGE GODDARD.

Approved July 31, 1866.

P. LYNCH, *Clerk, &c.*

Endorsed : Filed July 31, 1867. P. Lynch, cl'k, &c.

34 The District Court for the 3d Judicial District of the Territory of Utah.—Regular term, A. D. 1866.

Writ of Replevin.

TETTITORY OF UTAH, *Great Salt Lake County, ss.*

E. R. YOUNG, & SONS,
vs.
WILLIAM MARTIN. } In replevin.

Hon. John Titus Judge.

Whereas complaint has this day been filed in this court by E. R. Young, & Sons against William Martin, a copy of said complaint is herewith furnished.

These are, therefore, to command you to take into your possession the goods described in said complaint, unless a suitable bond shall be filed by defendent for their retention, and summons the said defendent personally to be and appear before the 3d District Court, at the court-house in Great Salt Lake City, on Monday the 13th of August next, at 10 o'clock a. m., to answer said complaint and show cause if any he has, why judgment should not be rendered against him as prayed for.

Hereof fail not, and make due return of this writ.

35 Witness my hand and the seal of said complaint, at Great Salt Lake City, this 31st day of July, A. D. 1867.

[SEAL.] PATRICK LYNCH, *Clerk, &c.*

[I. R. Stamp, 50 cents, cancelled.]

Endorsed : Writ in replevin. Issued July 31st, 1866. P. Lynch, cl'k, &c.

GREAT SALT LAKE CITY,
August 1, 1866.

I hereby return this writ, having served the same by reading to the within named party, and leaving with him a copy of complaint.

JOHN D. T. MCALLISTER,
Territorial Marshal,
For R. W. MCALLISTER,
Deputy.

Bond in Replevin to retain Goods.

36 Know all men, by these present that we, William Martin, principle, and W. S. Halsey and H. S. Eldredge as sureties, are held and firmly bound unto the District Court, in and for the third judicial district for the Territory of Utah, in the sum of twenty-two thousand dollars lawful money of the United States of America, which sum, well and truly to be paid to said court, we bind ourselves, our hei.s, executors, administrators, and assigns, and each of them, firmly by these present.

Signed with our own hands and sealed with our seals and dated the 1st day of August, A. D., 1866.

The condition of the above obligation is such that the above bounden Wm. Martin has had this day a writ of replevin sued out against him from said District Court, at the instance of E. R. Young & Sons, in Great Salt Lake City in said Territory, to replevy certain goods in the possession of said Wm. Martin, and claimed by the said E. R. Young & Sons, valued at the sum of eleven thousand dollars (as they say:) Now, if the said William Martin shall well and
37 truly pay all damages aud cost that may be adjudged against him by said Court, then the foregoing obligation to become null and void; otherwise to be and remain in full force and virtue.

[SEAL] WM. MARTIN.
[SEAL] W. S. HALSEY.
[SEAL] H. S. ELDREDGE.

Signed and sealed in the presence of—
JAMES G. HUGHES,
LEW. G. HILLS.

Endorsed: Bond in replevin to detain goods. Bond approved Aug. 1, 1866. (Signed) JOHN TITUS, *Judge.*

Filed August 1, 1866. P. Lynch, clerk, &c,

District Court, in and for the 3d Judicial District, in the Territory of Utah, August, A. D. 1866.

Plea in Abatement.

E. R. YOUNG, & SONS, *vs.* WM. MARTIN. } In Replevin.—Plea of Abatement.

Hon. John Titus, judge.

TERRITORY OF UTAH, *Great Salt Lake County, ss.*

38 Now, the said defendent, in his own proper person, comes and defends the wrong and injury where the said plaintiffs filed their declaration and sued out the writ, and prays judgment of the said writ and declaration, because he says the action is brought against him alone as defendent, whereas he is the acting agent of the "Overland Despatch Company," (formerly the "Butterfield's Overland Despatch Company,") and all his acts are done in the name of said company and not by said defendent alone, and this the said defendent is ready to verify. Wherefore, inasmuch as the said "Overland Despatch Company" is not named in said declaration nor writ, with said defendent, he, the said defendent, prays judgment of the writ and declaration and that the same may be quashed.

William Martin, the defendant in this cause, maketh oath and saith the foregoing plea is true in substance and fact.

WM. MARTIN.

Sworn and subscribed before me, this 13th day of August, A. D. 1866.

39 PATRICK LYNCH,
Clerk, &c.

Endorsed: Plea in abatement. Filed Aug. 13th, 1866. P. Lynch, clerk, &c.

District Court in and for the 3d judicial district.

Motion to elect.

E. R. YOUNG & SONS
vs.
WILKIAM MARTIN. } In replevin of goods.

TERRITORY OF UTAH, *Great Salt Lake County, ss:*

Hon. John Titus, judge. Aug., A. D. 1856.

Now comes the said defendant, William Martin, by his attorneys, Appleby and Marshall, and moves the court that the plaintiffs in the above-entitled cause shall be ordered to elect on which of the following named suits they will proceed, for the following reasons, to wit:

First. Because said plaintiffs, on the 7th day of July, A. D. 1866, filed their bill in equity and sued out a writ of injunction
40 against this defendant and one S. D. Irwin in relation to certain goods therein named.

Second. Plaintiffs, on the 31st day of July, A. D. 1866, filed their complaint and sued out another writ in replevin against this defendant to replevy the same goods mentioned in the former writ.

Both of which suits are now depending in this honorable court, and both for the same identical goods. Defendant therefore asks that said plaintiffs shall elect on which cause they will proceed, and withdraw the other.

APPLEBY & MARSHAL,
Att'ys for Defendant, J. W. Carter

Endorsed: Motion to elect. Filed August 13th, 1866. P. Lynch, clerk, &c.

41 District Court in and for the 3d judicial district of the Territory of Utah.

Answer to complaint.

E. R. YOUNG & SON
vs.
WILLIAM MARTIN. } In replevin.

TERRITORY OF UTAH, *Great Salt Lake County, ss.:*

Hon. John Titus, judge.

Now comes William Martin, defendant, and answers to the complaint of E. R. Young & Sons, plaintiffs in the above-entitled cause,

and for answer says: Defendant admits having the goods named in said complaint in his control and possession, and has a right to, for the following reasons, viz: that heretofore, to wit, on the 22d day of Sept., A. D. 1865, at the city of Atchison, Kansas, the "Butterfield Overland Despatch Company," (now the "Overland Despatch Company,") by their duly authorized agent, J. A. Kinney, made and entered into a written contract with J. C. & Jet Irwine to freight and transport certain goods, wares, and merchantdise, amounting to fifty to sixty thousand pounds from Atchison aforesaid to Great
42 Salt Lake City, in the Territory of Utah. Among said freight were the goods now in question, mentioned and claimed by said plaintiffs, over which said goods said Despatch Company, by their agents, the said defendant being their general agent, have never lost or given up [up] their control from the time of leaving Atchison to the present time, and still holds said goods for the payment of the freight thereon paid by said company to said Irwines, amounting to the sum of $2,055 30, and due and owing from plaintiffs to said company; a copy of said contract is attached hereto, (marked "A,") and made a part of this answer. (See also bills of lading, marked exhibit "E.") Defendant further answers and says, that on the 11th day of September, A. D. 1865, said company entered into and made a contract, at said city of Atchison, with J. T. McWurt & Co., to freight and transport from Atchison to Great
42 Salt Lake City, Utah Territory, certain goods, wares, and merchandise, marked "E. R. Young & Sons, G. S. L. City," amounting to 17,020 pounds at the rate of twenty-five cents a pound, with back charges paid on said freight up to Atchison of $465 95, amounting in the aggregate so $4,720 95, as per bill of lading herewith submitted, marked Exhibit "D."

Defendant further answers and says, that on the 10th day of May, A. D. 1866, said plaintiffs, by their duly authorized agent, William H. Miles, jr., at the city of New York, made and entered into a written contract in relation to said freight. Among other things, said plaintiffs agreed and promised to accept and pay the freight or charges on the goods mentioned above in the McWurt train to said McWurt, on the arrival of said goods in Great Salt Lake City. A copy of said contract is attached hereto, marked Exhibit B, and made a further part of this answer.

Defendant further answers and says, after the delivery of said goods by said McWurt to said plaintiffs in Great Salt Lake
44 City, plaintiffs refused and neglected to pay said McWurt the freight on said goods, according to plaintiff's contract, and thereby said company, by their agent, the defendant, was compelled to pay, and did pay, the freight on said goods to said McWurt, amounting to the sum of forty-seven hundred and twenty dollars and ninety-five cents, (4,720 95,) as per receipt attached hereto, marked Exhibit "C," and made a further part of this answer.

Defendant further answers and says, that in order to secure said company (they being the original contractors to freight for said plaintiffs,) for the monies thus paid to said McWhurt & Irwins for said

freight for plaintiffs, defendant, as agent of said company, took the said goods mentioned in said complaint into his possession from the "Irwine train," and retains and holds said goods as security for the payment of said freight thus paid for plaintiffs; and that plaintiffs has neither paid or tendered freight for said goods, therefore defendant still retains said goods.

Defendant therefore asks judgement against said plaintiffs for said goods, that the same may be held for the payment of said
45 freight, together with defendant's costs in this behalf expended.

WILLIAM MARTIN.

TERRITORY OF UTAH, *Great Salt Lake County, ss.:*

William Martin, the respondent above-named, maketh oath, and saith, that he has read the foregoing answer and knows the contents thereof, and that the same is true, of his own knowledge, except as to any matters which may be therein stated as on his information and belief, and as to these matters he believes them to be true.

Sworn to and subscribed before me this 20th day of August, A. D. 1866.

PATRICK LYNCH, *Clerk, &c.*

(Copy.)

Exhibit A.

BUTTERFIELD'S OVERLAND DESPATCH COMPANY,
ATCHISON OFFICE, J. A. KINNEY, *Agent.*

ATCHISON, KA., *Sept. 22d*, 1865.

J. C. & J. N. Irwine, of the city of Leavenworth, State of Kansas, hereby agree with Butterfield Overland Despatch Company to receive and load up immediately and transport fifty to sixty thousand
46 pounds of freight from Atchison, Kansas, to Salt Lake City, Utah Territory, by mule teams, for the sum of twenty-six and one-half cents per pound, said freight to be delivered at places of destination with all possible despatch. It is expressly understood, that the said J. C. & J. N. Irwine shall not be held responsible for loss or damage occasioned by Indian depredations.

Said freight-bill to be paid on delivery of goods at places of destination.

J. C. & J. N. IRWINE.

Witness: WM. R. BREWSTER.

"Exhibit B."

This agreement, made this 10th day of May, A. D. 1866, by and between the Overland Despatch Company, on the first part, and E. R. Young & Sons, of Salt Lake City, Utah, of the second, witnesseth: That whereas, said party of the first part has heretofore con-

tracted, by a written agreement, bearing date on or about the first day of July, A. D. 1865, to transport certain freight for said party of the second part from Atchison, Kansas, to Salt Lake City, Utah; and whereas, said freight is at various points, at and between
47 Atchison, Kansas, and Salt Lake City, Utah; and whereas, said party of the first part desire to be released from said contract, and from all responsibility and liability under and by reason of it:

Now, therefore, said party of the second part, in consideration of the sum of fifty-three hundred and fifty-five dollars and thirty-six cents, ($5,355 36-100,) to them in hand paid by said party of the first part, the receipt whereof is hereby acknowledged, have released and discharged, and by these presents do release and discharge, said party of the first part from said contract, and from all liability of whatsoever name or nature under or growing out of the same, except as hereafter stated.

And it is understood and agreed by and between the parties hereto, that the party of the first part shall deliver, and the party of the second part shall receive said freight at the several points where the same may now be stored or deposited, except as hereinafter provided.

And whereas, a portion of said freight is believed to be in transitu between Atchison, Kansas, and Salt Lake City, Utah, on what is known as the McWhurt train, under and by virtue of a certain
48 contract, made and entered into between said party of the said party and said McWurt.

Now, therefore, in consideration of the foregoing, the said party of the second part does hereby agree to accept at Salt Lake City so much of the freight as may be upon the McWurt's train subject to the contract between said party of the first part and McWurt, to settle with, and pay according to said contract or bill of lading said McWurt his charges for transporting said freight, and to hold the said party of the first part, harmless from any claim or claims which said McWurt may have against said party of the first part on account of said contract, so far as relates to the transportation of said freight, and in the event of any of the merchandise or freight upon the said McWhurt train shall not be full count or good order, said party of the second part shall have no claim for the same against the said party of the first part, until he shall have exhausted all his legal remedies against said McWurt.

It is herein understood and agreed by and between the parties hereto that the freight to be delivered as hereinbefore
49 provided shall be in good order and full count and free from all charge, except as hereinbefore provided.

And it is further understood and agreed by and between the parties hereto that each shall send an agent, the one to deliver, and the other to receive, the freight as herein provided; and in the event of any difference of opinion shall arise as to the freight being in good order or full count as herein contemplated, the parties hereto do hereby mutually covenant and agree to and with each other that the

agents so to be appointed shall award and determine such difference, either by themselves or with the assistance of some sutible third person to be selected by them; and the said parties hereto do mutually covenant and agree to and with each other that the award to be made by the said arbitrators, or any two of them, shall, in all things by us and each of us, be well and faithfully kept and observed, and to that end said agent of said party of the first part is hereby authorized and directed to pay any award of said arbitrators by a draft on said party of the first part, payable ten days after sight, at
50 their office in the city of New York.

In witness whereof, the committee duly authorized by the said party of the first part, and the said party of the second part, have hereinto set their hands the day and year first above mentioned.

THE OVERLAND DESPATCH COMPANY,
Per GEO. E. COCH, *Sec.*

In presence of—
THE COMMITTEE OF THE OVERLAND DES. CO.,
Per GEO. E. COCH, *Sec.*

[25-cent stamp]

Exhibit "C."

GREAT SALT LAKE CITY, *June 30th*, 1866.

Received of William Martin, gen'l agent of the Overland Despatch Co., formerly the Butterfield Overland Despatch Company, forty-seven hundred and twenty and 95-100 dollars, amount due us as per bill of lading, dated September 11th, 1865, on 17,020 pounds of freight, marked E. R. Young & Sons, Salt Lake City, Utah Territory.

J. T. McWHURT & CO.

[U. S. Rev. stamp 2 cents.]

51 *Exhibit "D."*

BUTTERFLELD OVERLAND DESPATCH,
Atchinson, Kansas , Sept. 11th, 1865.

Shipped by J. T. McWhurt & Co.

Received from "Butterfield Overland Despatch" the following merchantdise in good order, (except as below specified,) contents and value unknown, marked and numbered as per margin, which we promise to deliver without necessary delay in similar to, as per marginal mark, or order, at Salt Lake City, Utah, on payment of freight, according to the weight of each package at the time of shipping thereof, at the rate of twenty-five per pound and 474 95-100 dollars advance charge ; and we will not be responsible for any leakage, loss or damage to goods, save the same shall occur through the negligence of our agents, and we will not be accountable for condition or value of centents of packages containing liquor or glass.

In witness whereof, we have this 11th day of Sept., A. D.
52 1865, signed two bills of lading all of this tenor and date, one of which being accomplished, the other to stand void.

Marks.	Articles.	Weight.
E. R. Young & Sons, Salt Lake City.	WAGON NO. 17.	
	2 boxes m'd'se, 2 b'xs h'ware	907
	2 coils wire, 1 p'k'g (4 boxes) raisins.	
	1 p'ckge (2 boxes) soap.	
	1 " (2 b'x's) ink	377
	1 " (4 b'x's) nails	113
	4 boxes C. sugar, 2 sks.	220
	3 " glass	168
	WAGON NO. 20.	
	2 b'x's hardware, 4 b'x's glass.	
	1 p'ck'g (3 b'x's) raisins.	
	1 " (4 ") soap	1,060
	4 box's glass, 3 kegs nails.	
	21 kegs white lead	1,074
	3 sks. coffee	
	2 p'ck'g's, 8 boxes m'd'se, 5 sks. sugar	1,172
	WAGON NO. 21.	
	1 box ware, No. 3, 1 case, 8 b'x's tobacco.	
	1 " castings	822
	2 " hardware, No. 1,466.	
	1 p'ck'ge (3 b'x's) S. polish	488
	2 box's glass, 2 bales goods	410
	3 sks. sugar, 1 s'k coffee	347
	1 " " 1 " "	239
	1 box scales, ½ doz. shovels.	
	1 vise	134
53	WAGON NO. 23.	
	4 boxes h'ware, No. 1,497, No. 1,498, No. 1,495, No. 1,500.	
	1 p'k'ge (4 b'x's candles, star,) 1 box ware	1,360
	1 box axes, 2 sks. sugar.	
	4 k'gs nails	686
	1 box soap, 6 box's h'ware	584
	9 bundles scythe handles	207
	WAGON NO. 26.	
	1 box clocks, 1 box meat cutters	152
	1 box glass, (broke,) 8 kegs nails.	
	4 kegs h. shoes.	1,332
	2 b'x's glass, 1 box S. polish	
	3 bundle scythe handles	222

Marks.	Articles.	Weight.
E. R. Young & Sons, Salt Lake City.	WAGON NO. 28.	
	1 p'ck'ge (2 boxes) soap.	
	1 " (2 " yeast powders	300
	2 boxes h'ware	455
	1 p'k'g (2 b'x's) M. soap, 1 box h'ware.	
	1 " (") 1 box soda	343
	2 sks. sugar, 4 bundles shovels	329
	WAGON NO. 30.	
	2 boxes h'ware	806
	1 " axe handles, 1 box clocks	397
	1 " h'ware, 1 p'k'g (2 b'x's) h'ware	345
	1 bbl. h'ware	133
	2 boxs. tools	142
	1 box h'ware, 1 box oil.	
	1 B & S. No. 11	127
	4 boxs. glass, 1 box ware	297
	2 " " broke	123
	5 bundles shovels, 1 doz. L. H. forks...	187
54	ADDITIONAL IN WAGON NO. 28.	
	1 p'ck'g (2 box's) groceries.	
	2 " (4 ") soda	313
	Total weight	17,020

(Signed) T. McWHURT & CO.

Exhibit "E."

BUTTERFIELD OVERLAND DESPATCH,
Atchison, Kansas, Sept. 29, 1865.

Shipped by J. C. & J. T. Irvine, mule teams.

Received of Butterfield's Overland Despatch the following merchantdise in good order, (except as below specified,) contents and value unknown, marked and numbered as per margin, which we promise to deliver without unnecessary delay, in similar order to ag't B. O. D. Co., or order at Salt Lake City, Utah, on payment of freight, according to the weight of each package at the time of the shipping thereof, at the rate of twenty-six and a half cents pr. lb., and $215 60 dollars advanced charges; and we will not be responsible for any leakage, loss, or damage to the goods, save the same
55 shall occur through the negligence of agents, and will not be accountable for condition or value of contents of packages containing liquor or glass.

In witness whereof, we have this 29th day of Sept., A. D. 1865, signed 2 bills of lading, all of this tenor and date, one of which accomplished, the other to stand void.

Marks.	Articles.	Weight.
E. R. Young & Sons, Salt Lake City.	4 boxes m'd'se.	
	1 sack rice	1,136
	2 boxes m'd'se	365
	2 " "	649
	2 " castings	2,015
	3 " cog wheels	
	3 " bevel "	
	7 " pully "	
	2 " centers "	
	1 " small hopper	
	1 cast m'd'se, 1 h'h'd ware	683
	1 chest, 2 bbls. glass ware	224
	1 hopper	280
	1 hh'd m'd'se	268
	1 " hardware	274
	1 box "	416
	6 pieces sheet steel, 1 b'le m'd'se	1,167
	8 cooking stoves	1,938
	2 " "	476
	1 parlor "	158
	1 bbl. m'd'se	55
	2 b'x's nails 8 bdls, 4 end plow handles	276
	1 box m'd'se	335
	2 pieces machinery	3,065
56	1 chest tea, 7 doz. L H forks, ½ doz. L U forks	370
	½ dozen L H shovels, 2 bdls Russia iron	472
	1 bbl. m'd'se	254
	1 box "	25
	25 plows	3,297
		18,397

18,397 lbs. freight, @ 26² $4,875 20.

J. C. & J. N. IRWINE.

Endorsed: Filed Aug. 20th, 1866. P. Lynch, clerk, &c.

District Court, 3d judicial district.

Affidavit of plaintiffs of loss of contract, July 1st, 1865.

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN. } In replevin.

TERRITORY OF UTAH. *Great Salt Lake County, ss:*

E. R. Young, sen'r, being first duly sworn, says that neither he nor his co-partners has now, or ever has had, in his or their possession or control, scince the execution of the same, the contract of
57 affreightment reffered to in defendant's answer in said cause, as having been executed on or about the first day of July, A. D. 1865, between the said plaintiffs and the Butterfield Overland Despatch. Nevertheless, he further says, that he, affiant, co-partners and clerks, have made diligent search for said contract among their papers and elsewhere where the same would likely to be found, but have been unable to find said contract, nor do they know where the same now is, unless in the possession of defendant or his said principles.

E. R. YOUNG, SEN'R.

Subscribed and sworn to before me on this 29th day of August, A. D. 1865.

PATRICK LYNCH, *Clerk, &c.*

Endorsed: Filed August 29, 1866, P. Lynch, clerk, &c.

In the District Court of the 3d judicial district of the Territory of Utah, for the Territory.

Replication.

E. R. YOUNG & SONS, pl'tiffs,
vs.
WILLIAM MARTIN, d'f't. }

58 And now comes said plaintiffs, in reply to the answer of the defendant herein, say that they did, as alleged in said answer, make and enter into the contract of the 10th day of May, A. D. 1866, set forth in Exhibit "B," of said answer, but say that the contract executed on or about the 1st day of July, 1865, therein referred to, in addition to the stipulations for the transportation by the said Overland Despatch Company for said plaintiffs, of certain freight from Atchison to Great Salt Lake city, also contained the following stipulations, to wit: That for such transportation said plaintiffs were to pay to the said Overland Despatch Company twenty cents per pound in thirty days after the delivery of such freight at their point of destination.

Said plaintiffs further say, that the freight referred to in said con-

tract of the first day of July, 1865, was all, and the only freight ever in the possession of or under the control of said Overland Despatch Company, belonging to said plaintiffs; that by the terms of the contract of the 10th of May, A. D. 1866, the said Overland
59 Despatch Company agreed to deliver [to deliver] to said plaintiffs all of said freight (except what was then on the McWhurt train) at the several points where the same was then stored; that said freight was then stored at Atchison, Kansas, and Denver City, Col.; that on the 10th day of May, A. D. 1866, and for sometime thereafter, the goods described in said complaint were, with other goods belonging to plaintiffs, stored at the said city of Denver, and were no part or parcel of the goods referred to, as being in transitu on the McWhurt train, but were a part of, and included in, the freight, which by the terms of the said contract of the 10th day, A. D. 1866, were to have been delivered as aforesaid, at the several points where the same might be stored or deposited; that in pursuance of the contract last named, said plaintiffs appointed Daniels & Brown, of the said city of Denver, their lawful agents to receive said freight deposited at said city, and asses the damages thereon (if any) according to the terms of said last-named contract; that they likewise duly appointed Woolworth & Barton to receive the freight deposited, as aforesaid, at Atchison, Kansas; the said Daniels
60 & Brown met the agent of the said Overland Despatch Company at the city of Denver aforesaid, and a portion of the goods stored there were delivered to the plaintiffs, said agents, and damages to the amount of $49 13 assessed and fixed thereon, but that the said agents of the said Overland Despatch Company did not deliver all of said goods deposited at the said city of Denver, which by the said contract they were bound to do, but retained a portion of the same, to wit, the goods mentioned in said complaint, and that they omitted and neglected to assess the damages on the last-named goods, and also neglected and omitted to give a draft according to the terms of said contract for the damages, so as aforesad assessed, or in any other way pay the same, nor has the same yet been paid. Said plaintiffs say, that relying upon the faithful delivery of said goods, according to the terms of said plaintiffs, at great [great] expense, sent from Great Salt Lake city to the said city of Denver three wagons and teams, to transport said goods to the said city of Great Salt Lake, and that by reason of the non-delivery of said goods,
61 said wagons, upon reaching Denver, were left without any loading.

Said plaintiffs further say, that subsequently, to wit, on the 24 day of June, the goods referred to as being in transitu on the McWhurt train, arrived in the city of Great Salt Lake, and were on said day delivered to said plaintiffs, but that, in the transportation of said goods the said McWhurt did not use due diligence, or deliver the same in a reasonable time, nor were the goods so delivered in good order or full count; but, on the contrary, said goods were greatly damaged and greatly short in count; that said goods were delivered without any demand being made for freight; that on or about

66 District Court in and for the 3d judicial district for the Territory of Utah.—September, 1866.

Affidavit for continuance.—Affidavit in replevin.

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN. } *ss:*

Hon John Titus, judge:

William Martin, defendant in the above-entitled cause, makes oath and says that he cannot safely go to trial in the above cause, for the following reasons, to wit: On account of the absence of Mr. Brown, of the firm of Daniels & Brown, and one Philip Cranshaw, who are residents of the city of Denver, Territory of Colorado, who are important witnesses on the part of the defendant herein, and without whose evidence affiant cannot proceed to trial in this cause, and whose evidence of deposition he expects, and verily believes, he will be able to produce at a future day before this court. Affiant expects to prove be said witnesses that he, affiant, offered to deliver all the goods in the Irwine train, over which the affiant had control, as the agent of the Butterfield Overland Despatch Company, and consigned to E. R. Young & Sons, Great Salt Lake City, to the agents of said E. R. Young & Sons, to wit, Mss. Daniels & Brown at said Den-
67 ver City, but that on account of an attachment that had been issued against the plaintiffs herein by certain parties at Nebraska city, Nebraska Territory, to which the said goods upon the train of said Irwine would be liable, and for divers other reasons, the said agents of the said plaintiffs requested affiant to waive such delivery of the goods at Denver City aforesaid, and make the delivery of the said goods at Great Salt Lake City, Utah Territory, the original point of shipment of said goods, agreeing to pay said affiant therefor the sum of ten cents a pound for freightage from Denver City to Great Salt Lake City, and that affiant knows of no other persons by whom he can prove the facts herein stated; and that he has a meritorious defence, and that affiant does not make the affidavit for the purpose of unnecessary delay, but in order that justice may be done in the premises.

WILILAM MARTIN.

Subscribed and sworn to before me this 7th day of September, 1865.

P. LYNCH, *Clerk, &c.*

Endorsed: Filed September 7, 1866, P. Lynch, clerk, &c.

68 District Court 3d jud. dist. for said territory.

Motion to deposit amount claimed, to release property held under bond.—Foreclosure of lien.

OVERLAND DESPATCH CO.
vs.
E. R. YOUNG V. SONS.

E. R. YOUNG & SONS
vs.
WM. MARNIN. } In replevin.

TERRITORY OF UTAH, *Great Salt Lake County, ss*:

Now comes E. R. Young, of the above-named firm, by his atty's, and moves the court for an order that upon depositing in court the amount of money equal to the claim of the said Overland Despatch Company for freight, costs, and charges, whereon the said company, a lien on the goods in controversy, to wit, the full sum of $ that the said Martin, agent of said company, shall turn over to said Young & Sons the goods, wares, and merchandise now in his possession belonging to the said Young & Sons, and that the money so paid into court shall be retained subject to the order of the court on the first adjudication of the controversy between said parties.

HEMPSTEAD & BASKIN,
Atty's for E. R. Young & Sons.

Endorsed: Filed Sept. 29, 1866. P. Lynch, clerk, &c.

69 *Reasons for a new trial.—Motion for a new trial.*

E. R. YOUNG & SONS
vs.
WILLIAM MARTIN.

DEC. 11, 1866.

Hon. John Titus, judge.

Now comes defendant, William Martin, by Marshall and Carter, his attorneys, and move the court for a new trial herein, and that the verdict of the jury be set aside for the following reasons:

First. The jury found said verdict in total disregard of the evidence and in opposition thereto.

Second. The jury found said verdict in total disregard of law and in neglect and opposition of the law as charged by the court.

Third. The said verdict so rendered by the jury was from fear, favor, or bias, unjust, illegal, and in contradiction to both evidence elicited at the trial and law as charged by the court.

MARSHALL & CARTER,
Att'ys for Def't,

70 Endorsed: Reasons for new trial. Motion returnable Dec. 24, 1866.

Signed John Titus, judge. Filed Dec. 11th, 1866. Patrick Lynch, clerk, &c. Service of copy this 12th day of Dec., 1866. Admitted. Hempstead, att'ys for plt'ffs.

Copy of Record.

AUGUST 13th, 1866.

The case of E. R. Young & Sons *vs.* William Martin, in replevin, was called up. Writ returned duly served; counsel for the parties present.

Thos. Marshall, esqr , one of the counsel for defendant, filed plea in abatement, also motion to elect whether to try the case of Young & Sons *vs* Martin or Young & Sons *vs.* Martin & Irwine; motion argued by Thomas Marshall, esqr., for defendent, and Charles H. Hempstead, esqr., for plaintiffs. Submitted to the court and overruled. Plea in abatement argued, submitted, and overruled by the court.

AUG'T 23.

Plaintiffs' counsel filed demurrer to defendant's answer which was argued by Messrs. Baskin & Hempstead, for plaintiffs, and Mess. Marshall & Carter, for defendant. Pleadings submitted to the court and held under advisement.

71

AUG'T 24.

Court overruled demurrer filed by plaintiffs to defendant's answer, and ruled that defendant has a lien on the goods of E. R. Young & Sons, now in possession of defendant, for freight, both by the McWhurt train and the Irwine train.

Plaintiffs ordered to reply as though demurrer had not been filed. Charles H. Hempstead, esq., counsel for plaintiff, excepted to the ruling of the court.

SEPT. 7.

Defendant filed affidavit for continuance which was granted by the court.

SEPT. 29.

Plaintiffs filed motion to deposit the amount of money due defendant for freight, and asked to have the goods of plaintiffs now held under lien discharged. Argument set for Monday, Oct. 1, 1866.

OCT. 2d.

Ordered by the court that E. K. Young & Sons deposit the sum of six thousand seven hundred and seventy-five ($6,775 00) dollars, the amount claimed for freight, in the "Miners National Bank of Great Salt Lake City," subject to the order of the court and that on filing the certificate of said deposit with this court the said William
72 Martin is hereby ordered to release the goods of the said E. K. Young & Sons by him held under bond.

DEC. 7.

C. H. Hempstead, esq., made a verbal motion praying for judgment and damages on the pleadings. Motion argued by Mess. Baskin and Hemstead for plaintiffs, and Mess. Marshall and Carter for defendant.

Pleadings submitted to the court and held under advisement.

DEC. 8.

Motion for judgement overruled. Rulings excepted to by plaintiffs' counsel. The following jury was duly empannelled and to try the case, viz: William Wagstaff, Stephen Walley, Audrew Anderson, Frederick Reich, Peter Evans, Gustavus Williams, Edward Snelgrove, Ethan Barrows, Daniel Hitzman, John T. Hardie, Joseph B. Elder, and John Malloreey.

Plaintiffs' counsel asked that certain matter be stricken from the deposition of ——— Brown, of Denver, Colorado, which was overruled by the court, except the part in relation to ten cents a pound freight.

R. N. Baskin, esq., asked for on attachment for absent witnesses, which was allowed by the court as a matter of grace. Plaintiffs' counsel refusing to accept the same as a matter of grace, and
73 claiming it as a matter of right, it was refused by the court; whereupon plaintiffs' counsel objected to the ruling of the court.

Case opened to the jury by Mess. C. H. Hempstead for plaintiffs.

Charles Herman, Thomas D. Brown, James Needham, and J. S. McWhurt were called, sworn, and examined on the part of the plaintiffs.

Deposition of Henry E. Oakley read in evidence on the part of the plaintiffs.

DEC. 10.

Jury called; all answered to the names. Case resumed. Wm. J. Appleby sworn and examined on the part of the plaintiffs. James Needham recalled. Plaintiffs' counsel having asked a certain question of the witness, it was objected to by defendant's counsel. Objection sustained by the court. Ruling excepted to by plaintiffs' counsel. Plaintiffs' counsel introduced certain bills of lading, which was ruled out by the court Ruling excepted to. J. S. McWhurt, H. Kirkpatrick, and H. S. Eldredge sworn and examined on the part of the defence.

Depositions read and presented in evidence. Case presented to the jury by R. N. Baskin, esq'r, for plaintiffs, followed by M'ss. Marshall and Carter for the defence.

DEC. 11.

74 Case resumed. Jury called; all answered to their names. Major Hempstead closes the plaintiffs' case to the jury. Jury charged by the court, who retire in charge of the marshal to consider on their verdict.

Jury come into court, and through their foreman, present the following verdict, viz:

"SALT LAKE CITY, *Dec.* 11, 1866.

"We, the jurors in the case of E. R. Young & Sons *vs.* Wm. Martin, find a verdict that the plaintiffs shall receive their goods free of charge.

"GUSTAVUS WILLIAMS, *Foreman.*"

DEC. 24.

On motion for new trial. Argument opened by J. M. Carter, esq., for defendant, followed by C. H. Hempstead, esq., for plaintiffs. Closed by Thomas Marshall, esq., for defence. Case held under advisement.

DEC. 31.

Motion sustained and a new trial granted. Major Hempstead, on the part of the plaintiffs, asked leave to give defendants a bond for the full amount due to release the goods. Court advised counsel to agree among themselves on the nature and tenor of said bond.

MARCH 12, 1867.

This case being called on motion granted for a new trial, the following jurors were duly chosen, empannelled and sworn to try this
75 case: John W. Cooley, Andrew B. Williams, Edward Crittenden, William Boyes, Wm. B. Wright, James Wadsworth, E. T. Browning, James McBride, Rufus Forbush, jr., Stephen G. A. Duggins, David Grant, and James A. Wade.

Case opened to the jury by C. H. Hempstead, esq., for plaintiffs, and Thomas Marshall, esq., for defendent. Witnesses not being present, the case was held open till the 13th inst., at 10 a. m.

MARCH 31.

Case resumed. The following witnesses were called and sworn on the part of the plaintiffs: Wm. A. Miles, jr., John H. Kelson, Wm. S. Godbe, H. S. Eldredge, Chas. H. Bassett, L. H. King, Ami Jackman, Wm. Fowles, Charles Herman, and Henry Riser. Charles Herman being examined, plaintiffs' counsel presented him a letter from Wm. Martin, which was objected to by the defendant's counsel. Objection sustained by the court. Ruling excepted to.

C. H. Hempstead, esq'r, having presented certain bills of lading, they were objected to by defendant's counsel, and ruled out by the court. Ruling excepted to.

W. S. Godbe being put upon the stand, the court decided his testimony irrelevant, and ruled it out. Ruling excepted to.

Chas. Herman recalled. Counsel for defence objected to his testimony; court sustained the objection. Ruling excepted to.
76 Wm. H. Miles, jr., H. S. Eldredge, and L. H. King examined. Depositions read on the part of plaintiffs, followed by

depositions on the part of defendants. Defendant's counsel filed motion for non-suit, which motion was overruled. Ruling excepted to.

Case presented to the jury by Mess. Hempstead and Baskin for plaintiffs, and Marshall and Carter for defendants.

MARCH 14.

Jury called; all answered to the names. Jury charged by the court. Plaintiffs' counsel excepted to the charge. Jury retire in charge of the bailiff to consider on their verdict. After deliberating the jury came into court, and through their foreman presented the following verdict:

"We, the jury, find for defendant, that he retain the goods in his possession, and that plaintiffs pay the cost.

"J. W. COOLEY, *Foreman.*"

Whereupon it was ordered and adjudged by the court that defendant have and recover of and from the said plaintiffs his costs in this behalf expended, taxed at $, and that execution issue therefor, and that defendant retains the goods repleived till freight thereon is paid.

77 TERRITORY OF UTAH, *3d Judicial District, ss:*

I, Patrick Lynch, clerk of the District Court in and for the 3d judicial district of the Territory of Utah, certify that the foregoing and within is a true transcript of the papers and record in the case of E. R. Young & Sons *vs.* William Martin in said court.

Given under my hand and seal of said court this day of July, A. D. 1867.

P. LYNCH, *Clerk, &c.*

Endorsed: Filed Aug. 2, A. D. 1867. W. J. Appleby, clerk Supreme C., Utah.

REC. 182—3

O

IN THE SUPREME COURT OF THE UNITED STATES.

E. R. YOUNG & SONS, PLAINTIFFS,
vs.
WILLIAM MARTIN, DEFENDANT.

In error to the Supreme Court of Utah Territory.

ARGUMENT OF PLAINTIFFS' COUNSEL.

T. B. H. STENHOUSE, PRINTER,
GREAT SALT LAKE CITY, UTAH.
1867.

In the Supreme Court of the United States.

E. R. YOUNG & SONS, PLAINTIFFS,
vs.
WILLIAM MARTIN, DEFENDANT.

In error to the Supreme Court of Utah Territory.

ARGUMENT OF PLAINTIFFS' COUNSEL.

THIS case came up, from the 3d District, to the Supreme Court of said Territory, on appeal by Plaintiffs, from the final judgment of said District Court, under the provisions of an Act of the Legislature of said Territory, providing for appeals to said Supreme Court, approved Jan. 18, 1861 (Revised Statutes of Utah Territory, 1866; p. 66). The 1st. Sec. of said Act provides: "That, hereafter whenever any final "order, judgment or decree is made or rendered in the District Court of the Terri- "tory, the party aggrieved may have the same reviewed in the Supreme Court on "appeal, by obtaining from the Clerk of the Court making or rendering such order, "judgment or decree, a complete transcript of the record of the case, which shall be "filed with the Clerk of the Supreme Court."

The 7th Sec. provides that: "The hearing of the Supreme Court shall be upon "the record and argument of Counsel: and the District Court is hereby required to "sign all bills of exceptions taken to its rulings, decisions or charge to the jury. "which shall be incorporated into and constitute part of the record of the cause."

The 8th Sec. provides that: "When the judgment, final order or decree shall be "reversed, either in whole or in part, the Supreme Court may render such judgment "as the Court below should have rendered, or remand the cause to the Court below "to proceed according to the decision of the Supreme Court." Final judgment was rendered in the District Court, against the Plaintiffs, on the 14th day of March, 1867, and a complete transcript of the proceedings in said case, was filed by said Plaintiffs, with the Clerk of the Supreme Court of said Territory on the 2d day of August, 1867, attached to which transcript was an assignment of errors, by Plaintiffs, with a prayer asking that the judgment of the District Court might be reversed, and judgment rendered in favor of the Plaintiffs, on the record. No bill of exceptions was taken at the trial in said District Court, but in the record the following appears, to wit: "Aug. 23d, 1866, Plaintiffs filed a demurrer to the answer. which "was argued and taken under advisement. Aug. 24th. Court over-ruled Plaintiffs' "demurrer and ruled that 'Defendant has a lien on the goods of E. R. Young & Sons, " 'now in his possession, for freight, both by the McWhirt and Irwin trains, and " 'Plaintiffs are ordered to reply as though no demurrer had been filed.' Counsel "for Plaintiffs excepted to the ruling of the Court. Dec. 7th. C. H. Hempstead "made a verbal motion for judgment and damages on the pleadings. Motion argued "by Hempstead & Baskin, for Plaintiffs, and Marshall & Carter, for Defendant.

"Pleadings submitted to the Court and held under advisement.

"Dec. 8th. Motion for judgment over-ruled. Ruling excepted to by Plaintiffs' "Counsel."

The above noted exceptions and the claim of the right of the Plaintiffs to recover, on the record, the judgment prayed for in their complaint, embrace all the points arising on said appeal and presented by the assignment of errors. After the over-

ruling of the demurrer, the Plaintiffs filed a replication, the Defendant rejoined and the Plaintiffs surrejoined. The Plaintiffs motion for judgment on the pleadings, was made after surrejoinder was filed, and upon the over-ruling of said motion, Plaintiffs went to trial before a jury, and obtained a verdict in their favor for the possession of the goods in their complaint described together with costs, which verdict was set aside and a new trial awarded. Whereupon a second trial was had and a verdict returned for the Defendant, upon which verdict, judgment was rendered in favor of said Defendant for the possession of said goods, and costs.

The Defendant on the 7th day of Oct., 1867, filed, in the Supreme Court of said Territory, a motion to dismiss said appeal, on the following grounds, to wit: 1st, Because "Plaintiffs in the lower Court waived their exceptions to the ruling on the "demurrer, when they pleaded over and such demurrer was thereby withdrawn." 2d, "That the verbal motion for judgment was but a repetition of the demurrer "made under a different name and embracing the same points as those embraced in "demurrer, and the exceptions to the ruling thereon were also waived by Plaintiffs "pleading over."

The Supreme Court of said Territory dismissed said appeal on said motion, at the October term thereof, A.D. 1867, and the case is now in this Court on a writ of error sued out by said Plaintiffs.

The errors assigned in this Court, by said Plaintiffs, are: 1st, That the whole record of said case being before the Supreme Court of said Territory, it was the duty of said Court, under the 7th and 8th Sections of the Act of said Territory (to which reference has already been made), to examine any error appearing on said record and give judgment thereon, according to the merits of the whole case; and that the right of said Plaintiffs to recover, the goods described in their complaint, being clearly shown and admitted by the pleadings set forth in said record, the Supreme Court of said Territory erred in dismissing said appeal and in not rendering judgment in favor of said Plaintiffs, for the possession of said goods, as prayed for by them. 2d, That the demurrer of Plaintiffs was wrongfully over-ruled by the District Court and the exception noted on the record to the ruling on the same was not waived by Plaintiffs pleading over, the subsequent pleadings not having cured the alleged defects. 3d, The motion of the Plaintiffs for judgment on the pleadings was erroneously over-ruled, by said District Court, and judgment, was afterwards rendered in favor of the Defendant when judgment should have been rendered for Plaintiffs and that such error was not waived by Plaintiffs answering over because no pleadings were filed after said motion was made, neither was said judgment aided or cured by trial and verdict for the Defendant, because the defect is one of substance which cannot be cured, the whole record clearly showing the Plaintiffs right to recover.

The first of these assignments of error embraces two questions which dispose of the whole case, viz.—1st, did the Supreme Court of said Territory err in dismissing said appeal? 2nd, did they err in not rendering judgmentt, *pro confesso*, upon the face of said record, in favor of Plaintiffs for the possession of the goods described in their complaint. After disposing of these two questions we will briefly discuss the questions presented by the second and third assignments of error, in as much as the appeal was dismissed on grounds covered by them. First, then, did the Supreme Court err in dismissing said appeal? We think they did. By the provisions of the Sections of the Act of the Legislature of said Territory, before quoted three things are clear. 1st, that the aggrieved party may have any final order, judgment or decree of the District Court, reviewed in the Supreme Court of said Territory by obtaining a complete transcript of the record in the case and filing the same with the Clerk of the Supreme Court. 2nd, that the hearing of the Supreme Court shall be upon the record and argument of Counsel. 3rd, that upon reversing such final order, judgment or decree, said Supreme Court, (when the nature of the case will permit,) should render such judgment in the case as the Court below should have rendered. This latter provision is substantially the same as the 4th Section of the Act of Congress regulating errors and appeals. See Brightly's Dig., p. 259. No assignment of errors is required by said Territorial Act. The hearing is to be upon the record and argument of Counsel, and if the record shows the judgment appealed from to be erroneous, such judgment should be reversed. The Supreme Court of said Territory say, in their written opinion that a bill of exceptions must be taken in the Court below or they will not entertain the appeal. The Act under which said appeal was taken makes no such requirement and there is no rule of Court in said Territory requiring it. To entitle a party to the benefit of the provisions of a statute it is only necessary to substantially comply with all its requirements, and this the Plaintiffs have done. True, the 7th Section of said Territorial Act requires the Dis-

trict Court to sign all bills of exceptions taken to its rulings and that when so taken such bill shall be incorporated into the record. The object of this provision, (as it is the office of all bills of exceptions,) is to place upon the record errors which would not otherwise appear on the same; such for instance, as the improper admission or rejection of testimony, or the improper instruction of the Jury. But if error be committed in relation to things which become a part of the record as a matter of course, no bill of exceptions is required, because the error is already upon the record, and to require such a bill would be to make the record repeat itself. It has been repeatedly decided by this Court, that, "When the error is apparent on the face of the "record a bill of exceptions is unnecessary, in a case brought up on writ of error." Rogers vs. Burlington, 3rd Wallace, 661; Gorman et als vs. Lenox, 15 Peters, 115; Suydam vs. Williamson, 20 Howard, 436; Bennett vs. Butterworth, 11 Howard. 669; Cohens vs. Virginia, 6 Wharton, 410, 4 Howard, 155; Slacum vs. Pomeroy, 6 Cranch, 221; Garland vs. Davis, 4 Howard, 131. In the case of Slacum vs. Pomeroy, the only exception appearing on the record of the Court below, was to the refusal of the Court to give the following instruction to the Jury, asked by the defendant, to wit: "That the Plaintiff was not entitled to 15 per cent damages." Chief Justice Marshall in delivering the opinion, after overruling said exception, said, "There is, however, an objection taken to this "declaration. It omits to allege notice of protest, an omission which is deemed "fatal." "Had this error been moved in arrest of judgment it is presumable the "judgment would have been arrested; but it is not too late to allege, as error, in this "Court a fault in the declaration, which ought to have prevented the rendition of "the judgment in the Court below. The judgment should be reversed." The only exception taken in that case was overruled and the judgment reversed on a point not presented in the lower Court. In the case of Garland vs. Davis, 4th Howard, 131, before cited, the Court say, "In the examination of this case, a defect has been "discovered in the pleading and verdict, which was not noticed in the Court below, "nor suggested by the Counsel here. And the first question is whether under these "circumstances, it can be considered by us; and if it can be, and is a material defect "and not cured or not otherwise capable of being overcome, whether it ought to be "made a ground for reversing the judgment. There can be no doubt that exceptions "to the opinions given by the Court below must be taken at the time the opinions "are pronounced. But it is equally clear, that when the whole record is before the "Court above, as in this case, any exceptions appearing upon it can be taken by "Counsel which could have been taken below. So it is the duty of the Court to give "judgment on the whole record and not merely on the points stated by Counsel. I "proceed, then, to consider the nature and character of the difficulty in this case, ap-"pearing upon the record. Since discovering it, an opportunity has been given to "Counsel for the original Plaintiffs, which has been improved, to attempt to remove "it by argument but it still remains and consists in this." And for this defect, so discovered by the Court the judgment in the Court below was reversed. See also the numerous cases cited by the Court in the above case. In the case of Stockton vs. Bishop, 4 Howard, 155, the Court say "there is no bill of exceptions," yet they go into the merits of the case on the whole record and affirm the judgment below. How much stronger is the case at bar than those cited. This case was taken to the Supreme Court on appeal and all the provisions of the statute allowing said appeal were complied with; besides, the exceptions noted on the record, the assignment of errors, by Plaintiffs, and their prayer for the reversal of the judgment of the lower Court, and for the rendition of judgment in their favor, by the Supreme Court of said Territory, fully presented to said Court the question of said Plaintiffs' right to recover, on the face of the record, *pro confesso*, the goods in the complaint described.

It follows that the appeal was wrongfully dismissed and that the Supreme Court of said Territory should have reviewed the whole case upon the record. See also Stephen on Pleading, 119, 120, 121.

The second point now arises, did the Supreme Court of said Territory err in not rendering judgment, *pro confesso* on the record, in favor of said Plaintiffs for the possession of the goods in the complaint described? Whether said Court erred in not rendering such judgment depends upon whether Plaintiffs' right to so recover is clearly shown on the face of said record.

Such we think is the case.

The Plaintiffs' sue in replevin to recover the possession of certain goods described in their complaint and alleged to be of the value of eleven thousand dollars. The defendant answering admits that said goods belong to said Plaintiffs, but says that the Butterfield Overland Dispatch Co., as Common Carriers, have a lien on said

goods for the sum of $6776.00 freight, and that the defendant being the General Agent of said Co., he holds and has a right to hold said goods to satisfy said lien. These allegations, the Plaintiffs deny. Bearing upon this disputed question of lien, which is the only material point in issue between the parties, in the case, in the pleadings, which ended with a surrejoinder, the following mutual admissions are made, to wit: That on the 1st day of July, 1865, the Butterfield Overland Dispatch Co., entered into a written agreement with the Plaintiffs to transport a certain lot of goods from Atchison, Kansas, to Great Salt Lake City, among which goods were those described in the complaint, and that said Plaintiffs were, by the contract, to pay 20 cents per pound for such transportation in thirty days after the delivery of said goods in Salt Lake City. That the Butterfield Co., afterwards on the 11th of September, 1865, subcontracted with McWhirt & Co. for the transportation of a portion of said goods, at 25c. per pound. See Exhibit (C) of Deft's Answer. That on the 22nd and 29th of September, 1865, the Butterfield Co. subcontracted with J. C. and J. N. Irwin for the transportation of another portion of said goods at 26c. per pound. See Exhibits (A) and (E) of Deft's Answer. That afterwards on the 10th day of May, 1866, (the delivery of said goods having been delayed up to that time and damages having accrued to Plaintiffs on account of such delay), the said Butterfield Co. entered into a written contract with Plaintiffs, (a copy of which is attached to the defendant's answer and made a part of the same, (marked Exhibit (B)), containing the following recitals and stipulations, to wit: "Whereas, a written contract has heretofore been entered into by the Butterfield Co. to transport certain freight for E. R. Young & Sons, from Atchison to Great Salt Lake City, and whereas said freight is at various points between said places, and whereas said Co. desires to be released from said contract and from all liability under and by reason of it, in consideration of $5355.36 in hand paid to Plaintiffs' by said Co., said Plaintiffs released and discharged said Co. from all liability growing out of said contract, except as hereinafter stated, to wit: The Butterfield Co. were to deliver and Plaintiffs to receive said freight at the several points where the same was stored at the date of said contract, except the goods upon the McWhirt train, which then being *in transitu* were to be delivered in Salt Lake City. All the goods except those on the McWhirt train were to be delivered to Plaintiffs, at the points where the same where then stored, in good order, full count, and free from all charge; the damage on said goods, if any, to be assessed by the agents of said Plaintiffs and said Co., and in case said agents failed to agree, to appoint a third person. And the damages when assessed were to be paid, by draft for same on said Co. The goods described in the complaint were among those to be delivered free of all charge, and the goods on the McWhirt train were to be delivered to Plaintiffs in Great Salt Lake City, subject to the McWhirt contract or bill of lading, the said Plaintiffs to hold the Butterfield Co. harmless from all claims which the said McWhirt might have against said Co., on account of said contract or bill of lading and exhaust all legal remedy against McWhirt, for damages, by reason of short count or injury to said goods, before having any recourse therefor against said Co. (See Exhibits, (B and C) of the defendant's answer.) It is further mutually admitted in said pleadings, that the goods on the McWhirt train were delivered in Great Salt Lake City, to the Plaintiffs, without the payment of any freight thereon being made; that afterwards McWhirt demanded the sum of $4720 95, of said Plaintiffs for freight on said goods, which Plaintiffs refused to pay, and claimed that great damage to said goods had been suffered and must be allowed as a set off to said freight bill. Whereupon the Butterfield Co., by its said agent the defendant, without the knowledge of said Plaintiffs, or the settlement of any damages on said goods, paid McWhirt the amount of the freight so claimed by him, also paid the said J. C. and J. N. Irwin $2055.30, freight claimed on the goods shipped by them. And said defendant took possession of the goods shipped by the said Irwins, (said goods being the same described in the complaint,) and claims to hold them, for the freight so paid by said defendant, both to McWhirt and Irwins.

The goods so shipped by the Irwins were, under the contract of the 10th of May, 1866, to be delivered where they were then stored, free of charge (See Exhibit (B) of defendant's answer.); that at that time they were stored at Denver City; that they never have been delivered or tendered to Plaintiffs, and that said Plaintiffs' action in replevin seeks to recover their possession; that the defendant alleges in excuse for the non delivery of said goods, that the Plaintiffs' agents Daniels and Brown waived the delivery of the same at Denver City; that Daniels and Brown were appointed, by said Plaintiffs, in pursuance of the contract of the 10th of May, 1866, for the purpose of receiving said goods at Denver City, and assessing the damages thereon; that the defendant is the general agent of the Butter-

field Co., and claims to hold the goods in controversy to satisfy the lien of said Butterfield Co., claimed for the freight on both the McWhirt and the Irwin trains. The above is an acurate synopsis of the admissions of the pleadings in said case, in any way affecting the question of lien on said goods, *which is the material question.*

Now then, do these admissions refute the claim of a lien on said goods and show the Plaintiffs' right to their possession? As has already appeared, the pleadings mutually admit that under the contract of May, 1866, all the goods therein referred to were to be delivered at the points where they were then stored, free of all charge, except the goods on the McWhirt train; that the goods on said train were afterwards delivered without the payment of any freight thereon. It therefore follows that the goods in dispute were among those to be delivered free of all charge, and that no lien could attach to them under said contract, because it is a rule of law, *that where there is a contract between the carrier and owner, and the terms of such contract are inconsistent with a lien, none exists.* Angell on Carriers, Section 386; 3 Parsons on Contracts, p. 242, 248, and note (*a*). See also cases cited in Angell.

It is further mutually admitted by the pleadings, that the goods on the McWhirt train, were delivered without the payment of the freight claimed thereon, and it therefore follows that the lien upon the same was thereby discharged if any existed, because it is a rule of law, *that the relinquishment of possession* of goods upon which there is a lien, destroys such lien. Angell on Carriers, from Section 370 to 374; 2 Parsons on Contracts, 207, note (*e*), 3 Idem, p. 234, 238, 243. Unless the Butterfield Co. have a general lien on the goods in dispute, the defendant has no right to hold them for freight delivered on the McWhirt train. That they have no such lien, nor any lien whatever on said goods is conclusively shown by the fact that they were to be delivered free of all charge. The common carrier has not a general lien at common law, but only by special contract or by a general usage. General liens being an encroachment on the common law *are discouraged by the Courts and require clear and satisfactory proof to support them.* Angell on Carriers, Sections 357, 358, 359; 3 Parsons on Contracts, 239; Chitty on Carriers, 178; Edwards on Bailmemts, 548.

It appears from the contract of the 10th of May, 1866, that the delivery of all the goods, free of charge, and the assessment and payment of damages thereon if any, (except the goods on the McWhirt train) were conditions precedent to the payment of the freight on the McWhirt train; then how is it possible for the Butterfield Company to have either a special or general lien on the goods in dispute for the McWhirt freight when the delivery, of said goods to Plaintiffs, by the terms of said contract, was to have been made before the payment of said freight.

It is alleged in the replication and admitted in the rejoinder that under the contract of the 1st of July, 1865, the Plaintiffs were to have 30 days time, after the delivery of said goods, in which to pay the freight on the same, and such a provision in said contract, being inconsistent with the existence of a lien, and not having been abrogated, at the time the sub-contracts with McWhirt and Irwins, were entered into, the said Butterfield Co. at that time had no lien whatever on said goods, and therefore could not and did not confer any on McWhirt and Irwin by said sub-contracts. To admit that such a lien was so conferred would be to admit that the grantor can convey rights to the grantee, not possessed by such grantor; that the stream can rise higher than its source. Neither McWhirt nor the Irwins ever had a lien on said goods as against the Plaintiffs, and therefore when the agent of the Butterfield Co. repossessed himself of said goods he acquired no lien. A lien can only be acquired in two ways: by express contract or by operation of law. The right of lien set up in this case, however, rests on the transactions between Plaintiffs and said Butterfield Co., and as the contracts of the 1st of July, 1865, and of the 10th of May, 1866, constitute the very bases of such claim, and as both of said contracts refute the existence of such right, no lien on said goods can arise by operation of law.

The pleadings further mutually admit, that Daniels & Brown were, in pursuance of the contract of the 10th of May, appointed by Plaintiffs, to "receive said goods "at Denver City, and assess the damages on the same." The rejoinder alleges that Daniels & Brown waived the delivery of said goods at Denver City. Although waiver is denied by the surrejoinder, it is admitted that for the purpose of the appeal and the case in this Court, that all the allegations of the Defendant's pleadings are to be taken as true. The questions which grow out of these facts are, had Daniels & Brown, under their special appointment, any authority to waive the delivery of said goods at Denver City, and were the Plaintiffs bound thereby? What was the effect of such waiver, if the Plaintiffs were so bound? Daniels & Brown being special agents to receive said goods and assess the damages thereon,

could not bind Plaintiffs except within the scope of their authority, and a waiver of delivery not being within the scope of the authority to receive and assess damages, Plaintiffs are not bound by such waiver. For it is a rule of law that *a special agent is limited to his strict authority, and he who deals with him does so at his own peril, and must know* the extent of that authority. 1 Parsons on Cont. 40, 41, 42. 43, 44; Story on Agency, Sec, 126 and note; p. 137 and note.

In the case at bar the contract of the 10th of May notified the Defendant of the extent of the authority of the agent to be appointed under it. But suppose said agents had power under their appointment to waive the delivery of said goods, how does it affect the question of lien, or the right of Defendant to withhold said goods from the possession of Plaintiffs? It is nowhere alleged that Daniels & Brown waived the delivery of said goods entirely; the allegation is, that they waived the delivery at Denver City only. It is not alleged nor does it appear that any other point was agreed upon for delivery; nor is it alleged nor does it appear that the clause in the contract of the 10th of May, 1866, providing for the delivery of said goods free of all charge was abrogated or waived by any one. It will not certainly be claimed that Daniels & Brown, under their special appointment to receive said goods, had any power to abrogate or waive said provision of said contract. It therefore follows as an inference of reason and law that whenever or wherever said goods were delivered to the Plaintiffs it was to be free of all charge. How is it possible then for the Butterfield Co. to have any lien on said goods, or the Defendant to have the right to withhold them from the possession of Plaintiffs? Said Company has not now nor ever had any lien on said goods, and this we think clearly appears from the Defendant's own showing and admissions in the pleadings. It therefore follows that the Plaintiffs should recover the possession of said goods and that the Supreme Court of said Territory erred in not awarding judgment to them, for the possession of the same on said appeal.

The whole case has already been, as we think, disposed of; but as before intimated, the Supreme Court of said Territory having dismissed the appeal on the ground covered by the 2d and 3d assigunents of error, we will very briefly notice them. Then, is there error on the record, as alleged in the 2d assignment, in the ruling of the Court upon the demurrer; and if so was the error waived by the Plaintiffs' answering over?

The demurrer was lost from the files before the transcript was made out and does not therefore appear, in form, in said record.

This Court can only judge of its nature from the ruling of the District Court on said demurrer. The ruling as appears from the record was this: "Aug. 24th, Court "over-ruled demurrer filed by the Plaintiffs, to the Defendant's answer and ruled "that Defendant has a lien on the goods of E. R. Young & Sons in his possession, "for the freight both on the McWhirt and Irwin trains, to which Plaintiffs excepted."

From this ruling it is manifest that said demurrer questioned the lien claimed on said goods. Besides, the demurrer must have been general or special, and in either case all the substantial defects of the pleadings were brought before the Court. For it is a rule of law that "under a special demurrer, advantage may be "taken, as well of all *substantial* defects, though not assigned for cause, as of those "formal faults, which are so assigned; and this for the reason last before stated, viz.: "that as to faults not so assigned, a special demurrer operates precisely like a "general one." Gould on Pleading, p. 435, Sec. 20 and context; Stephen on Pleading, 142; 1 Chitty on Pleading, (13th Ed.) T. p. 664; 1 Tidd's Practice, 695; 6 Greenleaf, 426; Burnett *vs.* Bisco, 4 Johns, 235.

That the demurrer should have been sustained, has already appeared to this Court, from the fact that the answer of the Defendant, and the contract which is an exhibit therein and made a part of said answer (see exhibit B of the same), not only fail to show any lien on the goods in dispute, but on the contrary show that said Co. have no such lien.

Whether the Plaintiffs' waived their exception to the ruling of the Court on said demurrer, by answering over after the same was over-ruled, depends upon whether the subsequent pleadings cured the substantial defects of the Defendant's answer.

That such defects were not so cured has before appeared in the argument.

The rule of law on this point is, that "*formal defects*, but *not defects of substance*, "are cured by the *adverse party answering over.*" Gould on Pleading, p. 442, Sec.

36; p. 346, Sec. 22; p. 463, Sec. 13; p. 471, Sec. 27; p. 154, Sec. 192; Stephen on Pleading, 146-7-8; 1 Chitty on Pleading, 571-2-3; White *vs.* Delavan 21 Wend. 26, and cases cited; Burnham *vs.* De Bevorse, et al. 8 Howard, N. Y. Practice R. 159; Garland *vs.* Davis, 4 Howard, U. S. R. 131, and cases cited. The Supreme Court of said Territory in their written opinion, in which they decide the converse of the above rule, quote the case of Bell *vs.* Railroad Co., 4 Wallace, 598; United States *vs.* Boyd, 5 Howard, 29; 1 California, 470. In the case in 4 Wallace, "the record showed that there were pleas in abatement and a demurrer to them in "the case, the disposition of which was not very plain." And the Court in their opinion say, "But as Bell filed a plea to the merits and went to trial all ante- "cedent irregularities were waived."

There is nothing in the case to show whether the "*irregularity*" was substantial or merely formal. Besides, matters which are the subject of dilatory pleas, unlike matters of substance, are always waived by going to issue. In the case in 5 Howard, 29, the Plaintiffs demurred to the rejoinder of Defendant. The demurrer was sustained, the Defendant amended, the case went to trial and judgment was rendered for the Defendant, which judgment was brought to this Court for review.

The Court say "that the Counsel for Defendants ask the Court to revise the "judgment of the Court below, rendered upon the demurrer to the rejoinder of the "Defendants to the Plaintiffs amended replication over-ruling the demurrer, insist- "ing that the rejoinder was good and that the judgment should have been rendered "for the Defendants."

"The answer to this is, that the withdrawal of the demurrer. and going to "issue upon the pleadings operated as a waiver of the judgment."

It is difficult, from this language to tell what the Court mean, because the demurrer was sustained and not withdrawn. The Defendants after the judgment was rendered on the demurrer, amended their rejoinder, went to trial and obtained a verdict in their favor.

The only point the Court could or did decide in said case upon the question of waiver, was, that the Defendants by amending their rejoinder and going to trial waived the right to have the judgment on demurrer to the original rejoinder reviewed on error. That presents a different question from the one at bar. The effect of amending the rejoinder, was to make the amended rejoinder take the place of the original one, and the case after that stood the same as though the original rejoinder and demurrer had not been filed. The case in 1 California, 470, was made when the right of appeal was allowed from interlocutory decisions, or judgments. Since said decision was made, the law allowing such appeal has been repealed, and since then the practice has been just the opposite of that laid down in said case. 1 Labatt's California Digest, p. 98, Sec. 13, note; Burgoyne *vs.* Holmes, 3 California, 54.

We now come to the 3d assignment of error. Did the District Court err in over-ruling the Plaintiffs' motion for judgment on the pleadings, and did said Plaintiffs waive their exception to the over-ruling of the same, by answering over or by going to trial? Said exception was not waived by answering over, because, as has already been stated and as appears from the record, no pleadings were filed after the motion for judgment on the pleadings was made. Neither was said exception waived by trial or verdict for the Defendant, because the defects in the defense are substantial and such as a verdict cannot cure. Gould on Pleading, p. 159 and Seq. Idem, chap. 10, Secs. 7-13-21-22-27; 1 Chitty on Pleading, 674.

The Supreme Court of said Territory held that said motion was a mere repetition of the demurrer, and presents the same points presented by it. This is not the case, because the demurrer only presented the question of the right of the Plaintiffs, to recover on the complaint and answer. Whereas, the motion presented the question of their right to recover on the whole pleadings.

Said motion was in the nature of a motion for judgment *non obstante veredicto.* See Stephen on Pleading, 97, 146; 1 Chitty on Pleading, 656 and 7; Gould on Pleading, p. 482, Section 46. There can be no doubt that said motion would have been good, if it had been made *non obstante veredicto*, and *a fortiori* it was good before verdict. If said motion was a demurrer the same may be said of a motion for judgment *non obstante.*

In the case of Burnham *vs.* De Bevorse, et al, 8 Howard Practice R., 159, before cited, two of the defendants, after putting in an answer denying all the material al-

legations of the complaint, moved for judgment on the ground that the complaint did not contain a cause of action. The Court in delivering the opinion said: "I do "not, however, concur with the learned Counsel who, on the part of the Plaintiff, "contended that the defendant cannot take advantage of an incurable defect in the "complaint by a motion of this kind. The defect in this complaint, if it is a defect "at all, is one that can not be cured, and that, therefore, is not waived by any plead- "ing, but may be raised whenever the parties are before the Court, either at special "term by motion, or on the trial by motion in arrest after the verdict. The Court "may regard it even on general demurrer."

If our positions are well taken, this Court should reverse the judgment dismissing the appeal of Plaintiffs, and, under the 4th Section of the Act of Congress regulating errors and appeals, (Brightly's Dig, 259,) render judgment in favor of Plaintiffs for the possession of the goods in their complaint described, together with costs.

R. N. BASKIN & C. H. HEMPSTEAD,

ATTORNEYS FOR PLAINTIFFS.

S. DeWolfe
Atty for Plffs

DAILY TELEGRAPH PRINT.

IN THE

Supreme Court of the United States.

E. R. YOUNG & SONS,

Plaintiffs in Error,

versus

WILLIAM MARTIN,

Defendant in Error.

POINTS

FOR THE DEFENDANT IN ERROR.

JOSHUA M. VAN COTT,

OF COUNSEL FOR DEFENDANT IN ERROR.

New York:

EVENING POST STEAM PRESSES, 41 NASSAU STREET, COR. LIBERTY.

1869.

In the Supreme Court

OF THE UNITED STATES.

E. R. Young & Sons,
Plaintiffs in Error,

vs.

William Martin,
Defendant in Error.

Points for the Defendant in Error.

I.

Where a demurrer is overruled, with leave to answer over, and the leave is availed of, the demurrer ceases to be a part of the record.

5 How. R., 29, The United States *v.* Boyd.

18 N. Y. R. (4 Smith), 496, Brown *v.* Saratoga R. R. Co.

7 Wallace R., 82, 92, Aurora City *v.* West.

Where the demurrer is to one of the pleas or defences,

and leave to plead over is not availed of, the pleading demurred to may be used as evidence on the trial.

22 N. Y. R. (8 Smith), 472, Cutler *v.* Wright.

II.

The exception to a decision, on an informal motion for judgment on the pleadings, forms no part of the record, being only a part of the Clerk's docket.

12 Wheaton, 118, 119, Williams *v.* Norris.

The motion was not made on the trial, and may have been denied on a point of practice irrespective of the merits. It was addressed to the discretion of the Court. The exception raises a mere question of practice in the District Court.

III.

The plaintiffs have acquiesced in the finding of the jury upon the questions of fact, by not making a case; in the rulings of the Court on the trial, by not making a bill of exceptions; and in the validity of the defence, in law and in fact, by not moving in the District Court for judgment *non obstante*. Error in the District Court, in fact or in law, might have been corrected there, by a case, a bill of exceptions, or the proper motion; and the plaintiff's omission to resort to either of those usual, appropriate and adequate remedies, strengthens all presumptions and intendments after and in aid of the verdict.

IV.

The substantial question arising upon the record is, whether the facts alleged in the answer and rejoinder, and found by the jury to be true, aided by such intendments as will be made in support of the verdict, constituted a good defence to the action?

The defendant justified his retention of the goods as the agent of the Overland Dispatch Company, claiming a carrier's lien for freight. In July, 1865, the Overland Dispatch Company received these and other goods at Atchison, Kansas, and agreed with the plaintiffs to transport them to Salt Lake City. In May, 1866, while the goods were in transit, another agreement was entered into to relieve the Overland Dispatch Company from the duty of further carriage, in which the owners stipulated to receive those in question, free of charge, at Denver, and to pay McWurt & Co. for the transportation of the residue to Salt Lake City, according to the terms of the bill of lading delivered by McWurt & Co. to the Overland Dispatch Company, to save the latter harmless from the freight charges of McWurt & Co. The plaintiffs received their goods from McWurt & Co. without paying the freight, and the Overland Dispatch Company was compelled to pay it. They also, by their agents at Denver, waived the delivery there, and the goods were carried thence to Salt Lake City by J. C. & J. Irvine, who delivered them to the respondent on the plaintiffs refusing to pay the freight. The Overland Dispatch Company paid freight to the Irvines, amounting to $2,055 30, and to McWurt & Co., amounting to $4,720 59, and claims a lien on the goods retained for freight on all the goods carried. There was a single original shipment, having the same point of departure, the same point of delivery, one consignor and one consignee.

The contract of July, 1865, having been rescinded, the owners were not entitled to the delivery of the goods without first paying the freight; not the part carried by

the Irvines, for the carriage was under a new agreement; (See rejoinder, fol. 64, and affidavit, fol. 66;) and not the McWurt parcel, for there was an express agreement to pay according to the bill of lading. (See agreement, fol. 47–8; bill of lading, fol. 51.) Getting possession of the goods carried by McWurt & Co. without paying freight, operated as a fraud upon the Overland Dispatch Company.

The agreement under which the goods were carried from Denver to Salt Lake City, though not formally set out in the answer or rejoinder, was necessarily proved on the trial. The answer claimed a lien for freight, for carrying the goods to Salt Lake City; the cause was continued from the September to the March Term, to enable the defendant to prove the agreement set out in the moving affidavit, (fols. 66–7,) and the verdict of the jury necessarily negatived the suggestion in the replication, (fol. 60,) that the goods had been taken from Denver to Salt Lake City without the assent of the appellant.

Evidence of the agreement (the deposition of the appellant's agent at Denver, fol. 72,) having been received on the trial, without objection, it is now too late to object, even if it was not strictly admissible under the pleadings. The pleadings were amendable if the objection had been made; and not having been made, it should be taken to have been waived.

When a defect in pleading is so vital *that it is impossible to cure it on the trial*, either by amendment or by proof of the omitted fact without objection, judgment should be arrested or reversed. But where it is curable, it should be intended after verdict that it was cured on the trial, if the contrary does not expressly appear. Not to make such intendment is to encourage litigants to lay by and make catching objections, and thus to strangle justice in the meshes of legal practice and chicane. The

recent and better practice is to discourage such objections.

7 Wallace R., 82, Aurora City *v.* West.
51 Barb., 395, Kerr *v.* Towsley.
7 Wallace R., 565, Laber *v.* Cooper.
Id., 499, 505, Ewing *v.* Howard.
Id., 32, 38, The Georgia.

V.

The defendant in error should have judgment, with costs.

JOSHUA M. VAN COTT,
Of Counsel for Defendant in Error.

IN THE

Supreme Court

OF THE UNITED STATES.

DECEMBER TERM, 1867.

E. R. YOUNG & SONS,

Plaintiffs in Error,

vs.

WILLIAM MARTIN,

Defendant in Error.

DEFENDANT'S BRIEF.

New York:
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1867.

In the Supreme Court of the U. S.

E. R. Young & Sons,
Plaintiffs and Appellants,
against
William Martin,
Defendant and Respondent.

The first question that presents itself in the case at bar is, Should the respondent's motion to dismiss appellants' appeal in the court below have prevailed? 1

The record discloses that the appeal was taken upon four errors, alleged to have been committed by the Court of first instance, and excepted to there.

Three of these errors are alleged to occur in the judgment upon appellants' demurrer, and the order that appellants reply as though no demurrer had been filed; the fourth error assigned being the overruling of appellants' motion for judgment on the pleadings.

The appeal was dismissed in the court below on respondent's motion. This motion is based on the ground that the plaintiffs, by replying to defendant's answer, after adverse judgment upon the demurrer, waived their demurrer, and any exception taken to the judgment of the court thereon could not be raised in the Appellate Court. On the fourth error assigned: that the motion for judgment *made after plaintiffs' surrejoinder* was in essence and effect a demurrer, and was waived by going to trial on the merits after the overruling of said motion, our position is, that the filing of a replication, after 2

demurrer interposed to defendant's answer, waives such demurrer, and that the record, for all purposes of review, stands as though no demurrer had ever been made, or exception to the judgment on said demurrer taken; and by a parity of reasoning that the plaintiffs waived their "motion for judgment on the pleadings," and their exception to the judgment of the court overruling said motion, when they went to trial upon the merits.

It is a rule of law that a demurrer admits all such matters of fact as are sufficiently pleaded. Stephens on Pleading, 6th Am. Ed., 143; 1 Chitty, 662; Gould's Pleadings, chap. ix., sec. 4, 42, 43, and 44; 1st Saunders Pl. and Ev., 5th Am. Ed., 948, 953.

The issue presented to the court by plaintiffs' demurrer to defendant's answer, was: Has the defendant, admitting all facts well pleaded in his answer, a lien on the goods of plaintiffs? This demurrer went to the very gist of the defence, and the judgment of the court was that the defendant had in law a lien upon the property in question.

At this point the plaintiffs had their election, either to let the judgment of the court become final, and save their exception, or to abandon their demurrer and reply to defendant's answer.

The converse of this proposition would assume that there could be two judgments in this case upon the record at the same time; for the judgment upon said demurrer decided the merits of the defence (*i. e.* well pleaded) as well as the law arising upon facts pleaded by defendant.

Gould's Pleadings, chap. ix. Part 1, sec. 444.

That in the face of this record the plaintiffs could reply denying the facts admitted in their demurrer, carry a case before the jury, give in evidence controverting their admissions still remaining of record, and, after TWICE *submitting their case upon the merits to a jury*, revert to their demurrer, and in a court of review question the decision of the court of first instance.

We contend, therefore, that by the filing of their replication to the answer demurred to, plaintiffs waived said demurrer, and that it ceased to be for any purpose of review a part of the record of the case.

It is contended by the appellants that the third exception was made in the court of first instance. This court will observe that the judgment upon the demurrer was, "That the defendant has a lien on the goods of E. R. Young & Sons, now in possession of defendant, both by the McWhirt and the 'Irwin train.' Plaintiffs ordered to reply as though demurrer had not been filed," and the only exception noted is, "Charles H. Hempstead, Esq. *excepted to the ruling of the court.*" To the *ruling* of the court upon what? Unquestionably upon the demurrer, and not by any fair construction to the order that plaintiffs "reply as though demurrer had not been filed." How then can it be contended that an exception was taken to the order that plaintiffs reply, etc.? This was a distinct order, and no part of the judgment upon the demurrer. It cannot be contended that it was an arbitrary order of court that forced plaintiffs to reply under fear of contempt, nor can it be urged that it was an order made on the motion, or in the interest of defendant; on the contrary, we think it appears to have been made in the interest if not on the motion of plaintiffs, and that no exception was taken to the order, and that plaintiffs availed themselves of the order by replying.

It will be observed that in the court below the second and third assignments of errors are considered as involved in and incidental to the first, and treated accordingly. The appellants in their brief herein *assert* that "the demurrer was lost from the files." *We assert* that it was withdrawn on plaintiffs' motion made in open court after the judgment upon said demurrer; but as the record is silent on this question (except so far as the absence of the demurrer speaks), outside declarations can have but little weight.

The question here arises, how far the Territorial Statutes regulating appeals from the District to the Supreme Court affect or control this question.

Revised Statutes of Utah of 1866, page 66, section 1st, provide "that hereafter, whenever any *final* order, judgment, or decree is made, or rendered in the District Court of the Territory, the party aggrieved may have the same reviewed in the Supreme Court on appeal, by obtaining from the clerk of the *court making or rendering such order*, judgment, or decree, a complete transcript of the record

of the case, which shall be filed with the clerk of the Supreme Court."

The appellants contend that they complied substantially with this section in the court below, and that therefore the court should have disregarded the " motion to dismiss" and gone into the case upon the errors assigned.

If this position means anything pertinent to the case at bar, it is this:

That by reason of the territorial statute requiring that the appeal should be taken from the *final* order, judgment, or decree of the court:

1st.—That no appeal could have been taken from the judgment on the demurrer, it not being a *final* judgment.

2d.—That by reason of the statute requiring that the appeal should be taken from the *final order, judgment, or decree*, they could only review the judgment upon the demurrer by carrying their case to a *final judgment on verdict*, and then appealing.

In our opinion, to state these propositions is to refute them. In the first place, the judgment upon demurrer, until set aside by plaintiffs' own action, was as *final* as the judgment on verdict; one decided that (the merits of our defence being admitted) we had a lien in law on the goods in question; the other, that as a question of fact under the law as charged by the court we had a lien, and should retain the goods.

It cannot therefore be contended that the judgment upon the demurrer of plaintiffs was not an appealable judgment. *It rested with the plaintiffs whether that judgment should become final or not*, whether they should rest their case at this point upon the law, and stand by their demurrer.

The intent of the territorial legislature in requiring that the appeal should be taken from the *final* order, etc., is plainly to guard against the practice of appealing from *interlocutory* orders, judgments, and decrees; and since the judgment on the demurrer cannot be regarded as an *interlocutory* judgment, we cannot perceive wherein the section quoted supports the appellants' theory of appeals; nor is there anything in sections 7 and 8 of said statute to affect and control this case so far as to carry it from under the operation of the law as contended by the respondents

herein, and as laid down by this court in the case of 12
Boyd et al. *v.* United States, 5 Howard U. S. S. C. R., page 29. In this case the court say, "The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon demurrer to the rejoinder of defendants to plaintiffs' amended complaint overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants. *The answer to this is, that the withdrawal of the demurrer and going to issue upon the pleadings operated as a waiver of the judgment.*

"*If the defendants had intended to have a review of that judgment in a writ of error, they should have refused to* 13
amend the pleading, and permitted the judgment on demurrer to stand."

See also Clearwater *v.* Meredith, 1 Wallace, 25, S. C.; Bell *v.* O. & M. Railroad, 4 Wallace S. C. 598; Pierce *v.* Minturn, 1 Cal. 470.

We think these decisions effectually dispose of the assignment of errors arising out of the judgment of the District Court on plaintiffs' demurrer.

We come now to the motion of Plaintiffs for judgment on the pleadings *interposed after the plaintiffs' surrejoinder.* This motion is of an anomalous character; it raises a question of law upon the whole pleadings, viz., of lien (the office of a demurrer), and at the same time plaintiffs contend that this motion is exempt from the responsibilities of a demurrer, in other words, that it is in the 14
nature of a motion "non obstante veredicto;" wherein the analogy exists, the counsel of plaintiffs do not inform us.

The record shows that by their own act they closed the pleadings. If the motion for judgment had been made after defendant's rejoinder, it would clearly have been a demurrer. The question then arises, can the plaintiffs, by filing their surrejoinder, give the motion any other character? Certainly not; nor can the calling of this demurrer a motion change its legal effect, and by a species of transposition give it the effect of a motion "non obstante veredicto." We hold, therefore, that this motion was in effect and substance a demurrer, and that

15 it was waived when the plaintiffs went to trial on the merits; that the appellants cannot revive their exception to the ruling of the court upon said motion in a court of review, after two trials by jury in the District Court.

The decisions of the United States Supreme Court above quoted are applicable to this question, and we think conclusively settle it.

The plaintiffs herein quote numerous decisions in support of the converse of the above propositions. We think a careful examination of the cases cited will show that they have no direct application to the case at bar, and do not in any way militate against respondent's position. The authorities quoted by appellants decide, in substance, *that where the whole record is before the court*, it is the duty
16 of the Appellate Court to give judgment upon the whole record, and not merely upon points stated by counsel.

It will not be contended that in the case at bar the *whole record is before the court.* These cases do not decide that where the appellants bring up a *portion of a record, for the purpose of deciding certain points*, judgment should be given on [the whole of this portion of a record. The decisions cited were made in cases where the court had before them the *whole record*, and were thus enabled to gain a full view of all questions involved in the case.

It cannot be urged that these decisions lay down the doctrine that a demurrer waived and withdrawn in the court below is revived for the purpose of review in the
17 Appellate Court. Nor can it be urged that they decide that pleading over, after adverse judgment on demurrer, does not waive such demurrer.

On the contrary, the error assigned must appear on the record. And if our position be correct, the errors assigned herein do not even appear on the record.

We conclude, therefore, that the exception noted to the judgment of the court upon the demurrer was waived, and that the demurrer ceased to form part of the record from the time of the filing of plaintiffs' replication.

2. That there was no exception noted as assigned in plaintiffs' third assignment of errors.

3. That the motion on the pleadings for judgment was

in substance and effect a demurrer, and was waived when 18
the parties went to trial on the merits.

If these conclusions be correct, then the court below did not err in sustaining respondent's motion to dismiss the appeal, and this court will affirm the decision of the Supreme Court of Utah.

The appellants, assuming the reversal of the judgment of the Supreme Court of Utah, argue the law of the case upon the record, and to their argument it is but proper that we should reply.

It is contended that the court below should have examined the record before them, in disregard of the respondent's motion to dismiss, and upon such examination given judgment for the appellants "pro confesso," for the 19
possession of the goods in question.

The first question is, do the admissions of defendant's pleadings refute the claim of lien? in other words, are they so inconsistent with a lien as to be not only fatal in themselves, but incurable by verdict? It will appear by an examination of the record that the shipment of E. R. Young & Sons with the Overland Despatch Company, under the contract of July 1, 1865, *was one entire shipment, having the same point of departure, and the same point of delivery, one consignor, and one consignee.*

That the contract of May 10, 1866, embraced the whole of these goods; *that it discharges the O. L. D. Co. from the contract of July* 1, 1865, and from all liabilities under it, except those arising by reason of "short count and damage;" that it abrogates the contract of July 1, 20
1865, and places the relation of the contracting parties upon an entirely different footing.

The question then is, not was a lien inconsistent with the contract of July 1, 1865, but, was a lien inconsistent with the contract of May 10, 1866, under which the defendant, as agent of the O. L. D. Co., exercised it?

It is proper here to correct a very serious error of the appellants relative to the record.

The plaintiffs in their brief herein say, "That it appears from the contract of May 10, 1866, that the delivery of all the goods free of charge, and the assessment of damages thereon, if any (except the goods on the McWhirt train),

21 *were conditions precedent* to the payment of the freight on the McWhirt train." The record speaks for itself, and it is only necessary to examine the contract referred to, to see that this assertion is wholly unwarranted.

In the contract of May 10, 1866, the O. L. D. Co., for the considerations therein expressed, are "*released and discharged* from said contract (of 1865), and from all liability of whatever name or nature under, or growing out of the same, except as hereinafter mentioned." The exception to this discharge from all liability under the contract of July 1, 1865, is then expressed to be, that the goods in question shall be in "*good order and full count.*" The Company agree further that the freight received under contract of July 1, 1865, shall be delivered at the several
22 points where it may then be, free of charge, except the goods on the McWhirt train, which it is agreed shall be delivered at Great Salt Lake City, to E. R. Young & Sons, they paying McWhirt for the transportation of that portion of their goods on his train *according to his bill of lading.*

It is perfectly clear from the contract of May 10, 1866, that the O. L. D. Co. obtained an entire discharge from the contract of July 1, 1865, and from all liability under said contract, except that the freight should be in "good order and full count," and further, that the O. L. D. Co. were discharged from their liability to pay the McWhirt freight bill, *so far as the act of plaintiffs without the privity of Mc Whirt could discharge them.*

23 The contract, so far as it relates to the payment by plaintiffs of McWhirt's freight, is, that plaintiffs "are to settle with and pay McWhirt *according to his bill of lading.*"

By this agreement the plaintiffs assumed the contract of the O. L. D. Co. with McWhirt; and the relation of plaintiffs relative to the receipt of and payment for freight on his train became precisely the previous relation of the O. L. D. Co. The contract relative to the payment for this freight was a species of subrogation, wherein the plaintiffs by their own act were substituted into the position of the O. L. D. Co.

We hold that it is therefore idle to argue whether or

no under the contract of 1865 McWhirt had a lien on said goods as against E. R. Young & Sons; the question is, had McWhirt a lien on said goods as against the O. L. D. Co.? And this question is settled by an inspection of the McWhirt bill of lading. It simply provides that the goods are *to be delivered to the O. L. D. Co. on payment of twenty-six cents per lb.* freight. By the plaintiff's own act he has become a party to this contract, and his *rights and duties are indubitably fixed by the McWhirt bill of lading.* 24

It will appear from the record that the plaintiffs violated their contract of 1866 by refusing and failing to settle with McWhirt according to his bill of lading, and to hold the O. L. D. Co. harmless from any claim against them for damage by reason of injury to the goods and short count, if any; and that, by reason of such failure, the O. L. D. Co. paid the McWhirt freight-bill. 25

The question of the liability of the O. L. D. Co. to McWhirt is perfectly clear. It cannot be contended that they should have suffered themselves to be sued by McWhirt; nor can the question of whether they paid McWhirt too much or too little be raised here. All questions of fact under the pleadings are to be taken as found for defendants.

The question then is, having paid McWhirt his freight by reason of the plaintiff's failure to pay the same, and consequent breach of his contract, could the O. L. D. Co. hold any portion of the goods comprehended in the contract of May 10, 1866, under a carrier's lien for the freight so paid McWhirt? 26

We lay it down as a rule of law applicable to this case, "that where a quantity of goods are delivered in separate parcels at different times, yet if these form the subject of one entire agreement, the right of lien attaches upon each part for the expense incurred with respect to the whole."

Sodergreen *v.* Flight, 6 East. 622; Jones on Bailments, 99; Story on Bailments, 588; Angell on Carriers, sec. 373, and cases cited; Chitty on Carriers, 220; Edwards on Bailments, 548; Fuller *et al. v.* Bradley, 25 Penn. State Reports.

27 We hold, therefore, that the O. L. D. Co. had a lien upon any goods of plaintiffs *rightfully in their possession* for the money so paid, by reason of plaintiffs' breach of contract.

To contend that plaintiffs could receive all the benefits of the contract of May 10, 1866, and, after avoiding all its liabilities, come into court with unclean hands and claim that they are exempt from the operation of a carrier's lien, by reason of the thirty-day clause in the contract of 1865—a contract from which they received thousands of dollars for the discharge of the O. L. D. Co.—this is in effect to contend that the plaintiffs could by their own wrong greatly improve their own condition, and that a court of justice would lend its aid to objects so incon-
28 sistent with every principle of reason and law.

In our opinion one question alone remains: Were the goods held by Wm. Martin, as agent of the O. L. D. Co, *rightfully in defendant's possession?*

The defendant contends that these goods were in his hands, under the waiver of plaintiffs' agents, at Denver, Colorado, and an agreement that they should be delivered at Great Salt Lake City.

We contend that it is perfectly clear from the record—

1st, That Daniels and Brown were the agents of plaintiffs at Denver.

2d, That they waived the goods on the Irwin train, and contracted that they should be delivered at Great Salt Lake City.

The authority of Daniels and Brown to waive the de-
29 livery at Denver, and contract that the goods in question should be delivered at Great Salt Lake City, was elaborately argued in the District Court, and submitted to the jury under the instructions of the judge. We hold that the verdict of the jury settles this question of authority; and, further, that if there is any defect in the defendant's allegation of waiver, it is cured by the verdict of the jury (Stephens on Pleading, 147).

"We lay it down as a rule of law, applicable to this question, that a contract with an agent about the business to which his agency relates is a contract with the principal."

The question here arises, could the parties to the contract of May 10th, 1866, waive any of its provisions? It is perfectly clear that they could. It is equally clear that they did waive the delivery of the goods on the Irwin train by their duly authorized agents, and contract for their delivery at Great Salt Lake City. 30

We think it follows that the goods held by the defendant were rightfully in his possession as agent of the O. L. D. Co.

That, being rightfully in defendant's possession, the defendant had a lien upon them for the price of transportation from Denver City to Great Salt Lake City, and a lien for the freight due upon the McWhirt train.

We hold, therefore, that the District Court did not commit the errors assigned by the appellants; and we, therefore, ask this Court that the defendants have judgment herein for their costs. 31

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